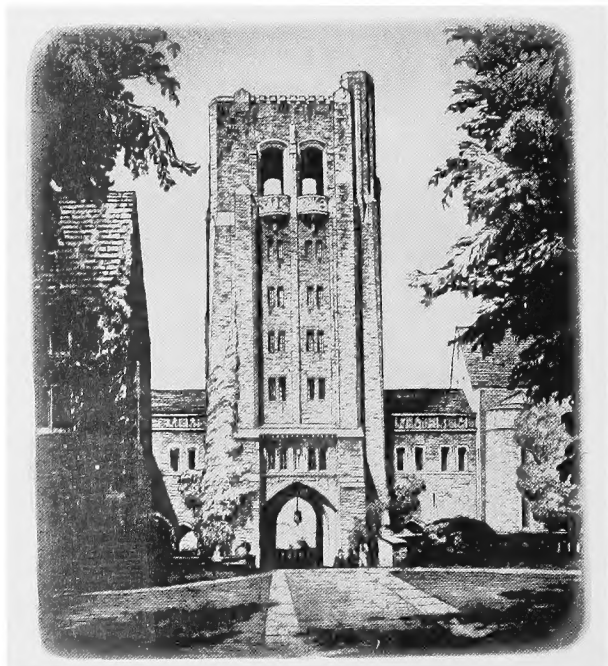


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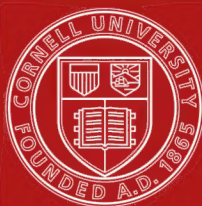
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THE RULE AGAINST PERPETUITIES.

THE

RULE AGAINST PERPETUITIES.

BY
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THIRD EDITION.

BOSTON:
LITTLE, BROWN, AND COMPANY.
1915.

B 4307

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Printers

S. J. PARKHILL & CO., BOSTON, U.S.A.



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PREFACE TO THE THIRD EDITION.

ALTHOUGH only eight years have passed since the publication of the second edition, about three hundred and eighty new cases on the Rule against Perpetuities (not including those in New York) have been decided during that time, many of them of considerable interest; and my views have altered or developed on several points. Notwithstanding an increase in the average contents of a page, there has been a material addition to the number of pages of the text and of the Appendix.

If this had been the first edition of this work, I should undoubtedly have adopted a more consecutive and compact arrangement in several respects than it now exhibits. It has seemed to me, however, to be advantageous to the reader to retain in the present edition a form which shows the development not only of the law but of the author's views during a period of twenty-eight years.

I have to thank my learned friend, William Rodman Fay, Esquire, of the Boston bar, for verifying the citations of authorities and seeing the book through the press, and my son Roland Gray for assistance in revising the text.

BOSTON, *July*, 1914.

PREFACE TO THE SECOND EDITION.

DURING the twenty years that have elapsed since the publication of the first edition, many important cases on the Rule against Perpetuities have been decided. About a hundred pages have been added to the text and fifty to the Appendix.

I have to give my best thanks to my learned friends Charles L. Barlow, Esquire, and John G. Palfrey, Esquire, of the Boston bar,—the former for verifying the citations of authorities, the latter for seeing the book through the press.

BOSTON, *January*, 1906.

PREFACE TO THE FIRST EDITION.

I HAVE long thought that in the present state of legal learning a chief need is for books on special topics, chosen with a view, not to their utility as the subjects of convenient manuals, but to their place and importance in the general system of the law. When such books have been written, it will then, for the first time, become possible to treat fully the great departments of the law, or even to construct a *corpus juris*.

Such a book should deal with the whole of its subject, its history, its relation to other parts of the law, its present condition, the general principles which have been evolved and the errors which have been eliminated in its development, and the defects which still mar its logical symmetry, or, what is of vastly greater moment, lessen its value as a guide to conduct.

A treatise of this nature I have tried to write on the legal doctrine governing the creation of future interests in property, commonly known as the Rule against Perpetuities.

The doctrines derived from the feudal law, which so closely limited the creation and transfer of future estates, have passed or are fast passing away. Any reasons for their existence have gone, and under the joint action of the Legislatures and Courts they have themselves almost disappeared. Of all that forest of learning there remains here and there only a stump over which an unlucky testator may stumble. But the Rule against Perpetuities is in full vigor;

where the Legislature has interfered, it has been to increase its stringency. Indeed, the Rule is substantially, at the present day, *the* law of future interests.

Though I have been desirous to keep as closely to the subject as possible, it seemed almost indispensable to show how the law of future interests has been thus simplified and reduced to the Rule against Perpetuities. Chapter II., which treats of this, cost more labor than any other in the book.

On the other hand, questions of construction have been rigorously excluded, unless where, as in Chapter XIX., the Rule against Perpetuities is concerned in their solution. There is an enormous number of cases reported where an interest did or did not violate the Rule, according as one or another construction was adopted. But the adoption of one construction rather than another was not affected by the existence of the Rule, and when a construction had been adopted there was no doubt whether or not the Rule applied to it. The consideration of such cases belongs to a treatise on Interpretation. It has always seemed to me a blemish in Mr. Lewis's admirable work that so large a part of it is devoted to these questions.

The learned reader will observe that some parts of the subject are treated at much greater length than others. The guide in determining the room to be allotted to each question has been its comparative difficulty. On points which have raised serious doubts in the minds of others, or in my own mind, the authorities and arguments have been fully given; but although I hope the book may be of service not only in practice but to students, it is not written *in usum tironum*, and undisputed doctrines have been stated with as much brevity as is consistent with accuracy.

The ambiguity in the meaning of terms, which is perhaps the chief reproach of our law, has worked great harm with the matters here considered. The Rule against Perpetuities should have been called the Rule against Remoteness. It is

aimed at the control of future interests; it has nothing to do, save incidentally, with present interests. But its name is a constant temptation to treat it as aimed against restraints on the alienation of present interests.¹ Hence frequent lapses into error, from which the courts have recovered themselves slowly and painfully; and hence also statutes, like those of New York, whose interpretation has cost, and will cost, a subsidy.² If this book has any merit, it is in the more or less successful attempt to free the subject from this source of confusion and mistake.³

In many legal discussions there is, in the last resort, nothing to say but that one judge or writer thinks one way, and another writer or judge thinks another way. There is no exact standard to which appeal can be made. In questions of remoteness this is not so; there is for them a definite recognized rule: if a decision agrees with it, it is right; if it does not agree with it, it is wrong. In no part of the law is the reasoning so mathematical in its character; none has so small a human element.

A degree of dogmatism, therefore, may be permitted here which would be unbecoming in other branches of the law. If the answer to a problem does not square with the multiplication table one may call it wrong, although it be the work of Sir Isaac Newton; and so if a decision conflicts with the Rule against Perpetuities, one may call it wrong, however learned and able the court that has pronounced it.

That I have done all my own sums correctly, I do not venture to hope. There is something in the subject which seems

¹ See § 118*a*, and the other sections there cited.

² See §§ 747-750.

³ When I began to collect the authorities, I did not clearly apprehend that the Rule against Perpetuities had no direct connection with restraints on alienation, and I intended to devote a chapter to these restraints; but as I went on I saw that such a chapter would be out of place, and therefore concluded to treat the subject in a separate essay, — *Restraints on the Alienation of Property*, Boston, 1883, (2d ed.) 1895.

to facilitate error. Perhaps it is because the mode of reasoning is unlike that with which lawyers are most familiar. The study and practice of the Rule against Perpetuities is indeed a constant school of modesty. A long list might be formed of the demonstrable blunders with regard to its questions made by eminent men, blunders which they themselves have been sometimes the first to acknowledge ; and there are few lawyers of any practice in drawing wills and settlements who have not at some time either fallen into the net which the Rule spreads for the unwary, or at least shuddered to think how narrowly they have escaped it.

Finally, I must acknowledge my great obligations to Mr. Lewis's classical treatise. He is prolix, and his prolixity makes him occasionally obscure ; but no writer on the Common Law excels him in acuteness and candor. I have never consulted him but with renewed respect. On a few points I have ventured to disagree with him, but always with diffidence. To Mr. Marsden's excellent treatise I also take pleasure in recognizing my indebtedness. From him, too, I have at times differed ; but much oftener I have been fortified in my conclusions on doubtful questions by finding that they agreed with his.

With two such books on our shelves I feel I owe an apology for adding another to the overgrown literature of the law. My excuse must be that it is thirty-six years since Mr. Lewis published the Supplement to his book, and that Mr. Marsden's plan excludes consideration of the history of the Rule ; but chiefly that neither of them deals with the American cases.

I have to thank Professor E. W. Gurney for kindly revising the sections in the Appendix on the Roman Law.

J. C. G.

BOSTON, *January*, 1886.

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THE RULE AGAINST PERPETUITIES.

CHAPTER I.

INTRODUCTION.

§ 1. CERTAIN transfers of rights in their nature alienable the law forbids. Sometimes the reason of this inhibition is the character of the person who is to make the transfer; thus an infant cannot convey his land. Sometimes it is the character of the person who is to receive the transfer; thus Mortmain Acts forbid devises to charitable corporations. Sometimes it is the nature of the right; thus the right to recover damages for a libel is not assignable. And sometimes the transfer is to take effect at too remote a period; thus a bequest to those descendants of the testator who shall be living fifty years after his death is bad. The rule of the Common Law, which determines this last class by fixing the limit beyond which future interests cannot be created, is called the Rule against Perpetuities.

§ 2. The Rule against Perpetuities is often spoken of as aimed at restraints upon alienation. Now it is true that future interests, to confine the creation of which within precise limits is the object of the Rule, make the interest of the present owner of an estate less marketable, and therefore may be loosely said to restrain alienation; but, speaking accurately, a future interest does not render a present interest inalienable. The present owner has less to convey than he would have if the

future interest did not exist; but all that he has he can convey freely. Suppose land is devised to A. and his heirs, with an executory devise over should he die unmarried, A. can sell his interest, and in the hands of the purchaser the land is subject to precisely the same devise over as it was in the hands of A., no more no less.¹ The misconception has been aided by the name given to the Rule. It would have been better had it been called the Rule against Remoteness.² But usage has settled the name as the Rule against Perpetuities.³

§ 2 *a*. The system of rules disallowing restraints on alienation, and the Rule against Perpetuities are the two modes adopted by the Common Law for forwarding the circulation of property which it is its policy to promote. The rules disallowing restraints against alienation and the Rule against Perpetuities have, therefore, it is true, the same ultimate end, but they serve that end by different means.⁴

§ 3. The practice of confounding the rule against remoteness with the rules disallowing restraints on alienation⁵ has led to grave errors,⁶ as, for example, (1) that future interests, if alienable, cannot be obnoxious to the Rule against Perpetuities;⁷ (2) that a trust to pay the income of property to A. and his heirs violates the Rule.⁸

§ 4. As the Rule against Perpetuities is the law limiting the time within which future interests can be created, we must first see what future interests can be created, apart from any

¹ Of course, if the contingency on which the future interest is to arise is an alienation by the present owner, then the future interest may be truly called a restraint on alienation. Such a case is the gift of a life estate to A., until he attempts to part with it, and then to B.

² This suggestion is due to the late Mr. Justice Gray of the United States Supreme Court.

³ See 1 Jarman, Wills (6th ed.)

296, note. 1 Tiffany, Real Prop., § 152; 1 Perry, Trusts (6th ed.) 377, note; 42 Am. Law Rev. 112.

⁴ See §§ 118 *a et seq.*, *post*.

⁵ As to these latter rules see the author's essay, "Restraints on the Alienation of Property." (2d ed.) Boston, 1895.

⁶ See § 118 *a*.

⁷ See Chap. VII., §§ 268 *et seq.*, *post*.

⁸ See §§ 235 *et seq.*, *post*.

question of remoteness. We shall find that originally the common law subjected their creation to many restrictions, but that these restrictions have been gradually so far removed that the Rule against Perpetuities is now almost the only legal check upon the granting of future interests.

CHAPTER II.

FUTURE INTERESTS.

§ 5. IN this chapter it is proposed to treat of future estates and interests in property, and of the restrictions on their creation other than the Rule against Perpetuities.

I. REAL ESTATE.

A. LANDS OF FREEHOLD TENURE.

1. *Common Law.*

§ 6. No seisin or ownership of a freehold estate in corporeal hereditaments of freehold tenure can begin *in futuro*. This is owing to the fundamental doctrine of the feudal law, that such seisin can be given only by a present livery, actual or constructive.

§ 7. The future freehold interests in real estate allowed by the common law are: (1) Remainders and Reversions; (2) Interests arising on Entry for Condition broken; (3) Possibilities of Reverter; (4) Curtesy and Dower; (5) Interests less than Ownership in Land of others; and (6) Interests by Escheat.

§ 8. (1) *Remainders and Reversions.* — Though seisin of a freehold estate can be given only by livery, yet the ownership may be cut up into several successive life estates, either with or without an ultimate estate in fee. The first life estate is called a particular estate; the succeeding life estates, and the ultimate estate in fee, if any, are remainders.¹ The essential qualities and the restrictions on the creation of a remainder

¹ Each remainder for life is, in its relation to the following re- mainders, also a particular estate. See § 100, *post*.

are that it must be created by the same conveyance as the previous freehold estate or estates, and that it must become a present freehold estate on the expiration of the previous freehold estate or estates as originally limited. A remainder cannot cut short or overlap the preceding estate, and no interval of time must separate it from such estate. The particular estate and the remainders form an unbroken series. Each remainder is said to be supported by the preceding estates. There can be no remainder after a fee simple. A freehold estate subject to a term for years is not a future estate of freehold at all, but a present estate of freehold; the holder of such estate has the present seisin.¹

§ 9. Remainders are either vested or contingent. A remainder is vested if, at every moment during its continuance, it becomes a present estate, whenever and however the preceding freehold estates determine. A remainder is contingent if, in order for it to become a present estate, the fulfilment of some condition precedent, other than the determination of the preceding freehold estates, is necessary. If an estate is given to A. for life, remainder to his eldest born son in fee, the remainder is contingent until the birth of A.'s first-born son, and then vests. The distinction between vested and contingent remainders is developed in the following chapter.

§ 10. Unless a contingent remainder becomes vested on or before the determination of the preceding vested freehold estates, it can never become a present estate: it has perished. It makes no difference whether the preceding estates have ended by reaching the limit originally imposed on them, or whether they have been cut short by merger, forfeiture, or otherwise. It has been doubted whether the common law originally allowed of contingent remainders; they were, however, recognized as valid as early as the fifteenth century.²

§ 11. A future estate may be indirectly created by giving livery of seisin for one or more life estates, without an ultimate

¹ Challis, Real Prop. (3d ed.) 80, 99. § 970, note 3, *post*.

² See §§ 100, 134, *post*.

remainder in fee. The estate remaining in the former owner ready to come into possession on the termination of the life estate or estates is a reversion. The same result is reached when an ultimate remainder in fee is contingent. Until it vests, there is a reversion in the feoffor and his heirs.¹

§ 12. (2) *Interests arising on Entry for Condition broken.*—Future interests sometimes arose from conveyances being on condition, implied or express. All estates were conveyed on the implied condition that the tenants should not deny tenure. Express conditions might also be attached to a conveyance. On breach of a condition the feoffor had a right to enter; but, until entry, the estate remained with the feoffee. The right of entry was inalienable, and therefore advantage of a condition could be taken only by the feoffor and his heirs.²

§ 13. (3) *Possibilities of Reverter.*—Some estates were terminable by special or collateral limitations; for instance, an estate to A. till B. returned from Rome; or an estate to A. and his heirs until they ceased to be tenants of the Manor of

¹ When a conveyance is by way of use or devise, there is, unquestionably, during the contingency of a remainder in fee, a reversion in the grantor or devisor and his heirs; and the prevailing opinion seems to be the same way upon a feoffment at common law. *Plunket v. Holmes*, 1 Lev. 11; 1 Sid. 47; T. Raym. 28. *Purefoy v. Rogers*, 2 Wms. Saund. 380, 382, and note. *Carter v. Barnardiston*, 1 P. Wms. 505, 511–518. *Egerton v. Massey*, 3 C. B. N. s. 338, 358. Co. Lit. 191 a, Butler's note. *Fearne*, C. R. 360–364. Wms. Settlements, 207–210. Wms. Real Prop. (22d ed.) 363. See *Pinkney v. Weaver*, 216 Ill. 185; *Bigley v. Watson*, 98 Tenn. 353. *Contra*, see 40 Edw. III. 9 b; Co. Lit. 342 b; 2 Prest. Abs. 101–107; Cornish on Rem. 175–178; 4 Kent,

Com. 257–260; *Bohon v. Bohon*, 78 Ky. 408.

The transfer *in futuro* of remainders and reversions already existing is considered § 17, *post*.

² See *Ashuelot Nat. Bank v. Keene*, 74 N. H. 148. In Massachusetts it has been held that the right of entry cannot pass by deed, *Rice v. Boston & Worcester R. R. Co.*, 12 Allen 141; but it has been held, apparently on a misunderstanding of *Doe v. Scott*, 3 M. & S. 300, and *Jones v. Roe*, 3 T. R. 88, that it can be devised. *Hayden v. Stoughton*, 5 Pick. 528. *Austin v. Cambridgeport Parish*, 21 Pick. 215. On breach of a condition attached to an estate for years, the lessor may put an end to the estate without entry. *Leake*, Land Law, 226.

Dale.¹ On the happening of the contingency, the feoffor was in of his old estate without entry. The estate was not cut short, as it would have been by entry for breach of condition, but expired by the terms of its original limitation. After a life estate of this kind a remainder could be limited. After such a fee it has commonly been supposed that there could be no remainder;² but there was a so-called possibility of reverter to the feoffor and his heirs which was not alienable.³

§ 14. An estate in "fee simple conditional," so called, was by far the most common of these estates with special limitations.⁴ This was an estate to the donee and the heirs of his body (either all the heirs of his body or some special class of

¹ See Co. Lit. 27 *a*, Harg. note 157; Challis, Real Prop. c. 17.

² See Buckhurst Peerage, 2 Ap. Cas. 1, 23, 24. But cf. § 14, *post*, note 5.

³ See the following section. In Pennsylvania, where possibilities of reverter have been assumed to still exist (see § 38, *post*), the Court seems also, in *Scheetz v. Fitzwater*, 5 Pa. 126, to have thought them assignable, and has now so held in *Slegel v. Lauer*, 148 Pa. 236. See § 115 *a*, *post*.

⁴ See Challis, Real Prop. c. 18; 2 P. & M. Hist. Eng. Law (2d ed.) 14-19; 3 Holdsworth, Hist. Eng. Law, 95-98; 2 Law Quart. Rev. 276. Notwithstanding its name, this estate was one with special limitation rather than on condition. The writ of *formedon in reverter* alleges no entry by the donor; F. N. B. 219; Rast. Ent. 375; and this writ was the one in use at the common law. See St. De Donis, 13 Edw. I. c. 1, § 4. Cf. *Willion v. Berkley*, 1 Plowd. 223, 242; 2 P. & M. Hist. Eng. Law (2d ed.) 23, note 2, 28; 19 Am. &

Eng. Enc. of Law (1st ed.), Real Property, 1054. Mr. Butler, in his note to Co. Lit. 241 *a*, says that an estate in fee simple conditional was an estate on condition, but that he is wrong is shown by the assertion which he goes on to make, viz.: that though the tenant died without leaving issue surviving, yet the husband could have curtesy or the wife dower. Mr. Butler states the general rule to be "that where the fee, in its original creation, is only to continue to a certain period, the wife is to hold her dower, and the husband his curtesy, after the expiration of the period to which the fee charged with the dower or curtesy is to continue; but that where the fee is originally devised in words imparting a fee simple, or fee tail absolute and unconditional, but by subsequent words is made determinable upon some particular event; there, if that particular event happens, the wife's dower and the husband's curtesy cease with the estate to which it is annexed;" "but," he says, "for reasons now rather to be guessed than demon-

them), with a provision that on the failure of such heirs the land should revert to the donor and his heirs. Sometimes

strated, this case was made an exception to the general rule." The true reason of the allowance of dower and curtesy on the determination of a fee simple conditional would seem to be because such an estate was *not* an estate on condition but an estate with a special limitation. The general rule laid down by Mr. Butler appears to be correct; it accords with the declaration of Anderson, C. J., in *Plain v. Sams*, Goldsb. 81, 82: "that if an estate be determined by limitation, this will not avoid a tenancy by the curtesy, but otherwise it is if the estate be determined by a condition; for this shall relate to the defeasance of the estate." Thus there is no question that entry for breach of condition cuts off dower. See 22 Edw. III. 19, pl. 86; Perk. §§ 311, 312, 317; and on the other hand it has been recognized from the beginning that there is dower after the expiration of an estate tail. 10 Edw. III. 26, pl. 52; Perk. § 317. *Sammes and Paynes Case*, 1 Leon. 167; s. c. *sub nom.* *Paine v. Sammes*, 1 And. 184; *sub nom.* *Paine's Case*, 8 Co. 34 a; *sub nom.* *Plain v. Sams*, Goldsb. 81. As to estates in fee simple conditional in particular, Bract. 297 b, *ad fin.* says, "*Idem erit de terra data in maritagio, licet revertatur pro defecto heredis, uxor dotem obtinebit;*" and in *Paine's Case*, as reported in 8 Co. 34 a, it was "resolved by the whole Court [of Common Pleas] that at the common law, if lands had been given to a woman and the heirs of her body, and she had

taken a husband and had issue and the issue died, and the wife 'also without issue, whereby the inheritance of the land did revert to the donor, in that case the estate of the wife is determined, and yet the husband shall be tenant by the curtesy, for that is *tacite* implied in the gift." See *Barksdale v. Gamage*, 3 Rich. Eq. 271, 275. In like manner when land escheats *per defectum sanguinis*, the widow of the tenant has dower. Bract. 297 b, *sub fin.* Bro. Ab. Ten. 33. So the widow of the Prince of Wales as Duke of Cornwall. The Prince's Case, 8 Co. 14 a, 27 a. When a special limitation is such that it may determine the fee in the lifetime of the tenant, e. g. till the building of St. Paul's shall be finished, it has been said that the dower will be cut off. Jenk. 5. *Per Vaughan, C. J.*, in *Anon.*, Carter, 208, 210, *sub fin.* Cf. *Chaplin v. Chaplin*, 3 P. Wms. 229. In reaching the conclusion that dower continued after the determination of a fee simple conditional, no reliance has been placed upon the decision in *Buckworth v. Thirkell*, 3 B. & P. 652, note, that an executory devise does not cut off curtesy. That case has been often followed as to dower also, but it has been generally recognized that Lord Mansfield's ruling in that case was due to his not regarding the distinction between a fee with a special limitation and a fee subject to a shifting use or executory devise. See *Park, Dower*, 49, 50, 153-190; *Scribner, Dower* (2d ed.), cc. 13, 14.

this provision was expressed; but, even though not expressed, yet on a gift in frankmarriage, or simply to A. and the heirs of his body, it was tacitly implied.¹ If the donee of such an estate had issue born, then he could alienate the land² so as to pass a fee simple. If he never had issue born, or if he alienated before issue born,³ or if his issue, though born, had all died before there had been any alienation of the estate, then, on his death, or the subsequent failure of his issue, the land reverted to the donor and his heirs.⁴ This possibility of reverter was inalienable;⁵ but it could be released to the tenant of the fee simple conditional.⁶ There could be no remainder after a fee simple conditional.⁷

¹ *St. De Donis*, 13 Edw. I. c. 1, § 1. *Bract*. 17 b. See *Glenn v. Glenn*, 21 So. Car. 308.

² It is held in South Carolina, where estates in fee simple conditional still exist, that they are never devisable. *Jones v. Postell*, Harp. 92.

³ *Co. Lit.* 19 a. See *Anon.*, *Fitz. Ab. Formedon*, 65; *Willion v. Berkley*, 1 Plowd. 223, 235, 245; *Barksdale v. Gamage*, 3 Rich. Eq. 271, 279. But in *Powers v. Bullwinkle*, 33 So. Car. 293, 302, 303, on a mistaken statement of what had been decided in *Barksdale v. Gamage*, it was held that though the alienation was before issue born, yet if issue were born afterward, the possibility of reverter was barred; and *Powers v. Bullwinkle* was followed in *Dillard v. Yarboro*, 77 So. Car. 227.

⁴ *Anon.*, *Fitz. Ab. Formedon*, 65. *Co. Lit.* 19 a. See *Willion v. Berkley*, 1 Plowd. 223, 235; *Barksdale v. Gamage*, 3 Rich. Eq. 271, 279, 280; *Powers v. Bullwinkle*, 33 So. Car. 293, 302, 303.

⁵ It cannot be devised. See

Bedon v. Bedon, 2 Bail. 231, 248; *Adams v. Chaplin*, 1 Hill, Ch. 265, 280; *Deas v. Horry*, 2 Hill, Ch. 244; but cf. *Cruger v. Heyward*, 2 Des. 94; note to *Mazyck v. Vanderhorst*, Bail. Eq. 48, 56; *Powers v. Bullwinkle*, 33 So. Car. 293, 302. The possibility of reverter after a fee simple conditional in copyhold lands (see § 70, *post*) is devisable under the Wills Act (1 Vict. c. 26), § 3, which also makes a right of entry for condition broken devisable. *Pemberton v. Barnes*, [1899] 1 Ch. 544. The fee simple conditional does not merge in the possibility of reverter. *Adams v. Chaplin*, 1 Hill, Ch. 265. The contrary has been held in the case of copyholds. *Doe d. Simpson v. Simpson*, 4 Bing. N. C. 333; 5 Scott, 770; *Doe d. Blesard v. Simpson* (in Cam. Scacc.) 3 Man. & G. 929. See *Bishop of Sodor and Man v. Derby*, 2 Ves. Sen. 337, 355.

⁶ *Pearse v. Killian*, *McMull. Eq.* 231. See *Adams v. Chaplin*, 1 Hill, Ch. 265, 278.

⁷ *Willion v. Berkley*, 1 Plowd. 223, 235, 242. *Co. Lit.* 18 a. 2

§ 15. (4) *Curtesy and Dower*. — Curtesy is the estate for life which a man has in an estate of inheritance of his

Inst. 336. *Mazyck v. Vanderhorst*, Bail. Eq. 48. *Bedon v. Bedon*, 2 Bail. 231, 248. *Bailey v. Seabrook*, Rich. Ch. Cas. 419, 426 *et seq.* *Adams v. Chaplin*, 1 Hill, Ch. 265. *Edwards v. Barksdale*, 2 Hill, Ch. 184, 197. *Deas v. Horry*, Ib. 244. *Williams v. Caston*, 1 Strob. 130, 133. *Buist v. Dawes*, 4 Strob. Eq. 37, 48. The case of *Cruger v. Heyward*, 2 Des. 94, if it decides the contrary, must be considered overruled, see note to *Mazyck v. Vanderhorst*, Bail. Eq. 48, 58.

In modern times the belief and practice have been in accordance with the text. But Sir Frederick Pollock and Professor Maitland have shown good reason to doubt whether this was so originally. 2 P. & M. Hist. Eng. Law (2d ed.) 23–25, 28; and see an article by Professor Maitland, 6 Law Quart. Rev. 22; criticised, Challis, Real Prop. (3d ed.) 85, 428. Cf. also 2 Bract. Note Book, 77, 347 (to which the author's attention was drawn by his learned friend and colleague, Professor Joseph Warren); Bract. 18 b; Fleta, Lib. 3, c. 9, § 9; *Rowden v. Maltster*, Cro. Car. 42, 43; *Doe d. Simpson v. Simpson*, 4 Bing. N. C. 333, 345; 5 Scott, 770, 788; *Gardner v. Sheldon*, Vaugh. 259, 269; 2 Prest. Est. 318, 319, 323–354; note to *Mazyck v. Vanderhorst*, Bail. Eq. 48, 53, 55, 56.

At the present day, apart from the objection of remoteness, there seems no reason why a limitation in a will after a fee simple conditional should not be good as an executory devise. *Gardner v. Sheldon*,

Vaugh. 259, 270. *Cruger v. Heyward*, 2 Des. 94 (see note to *Mazyck v. Vanderhorst*, Bail. Eq. 48, 58). *Rowland v. Warren*, 10 Oreg. 129. (But cf. *Doe d. Simpson v. Simpson*, *ubi sup.*) And several cases in which an executory devise after a fee simple conditional has been held to be too remote seem to imply, by raising and deciding the question of remoteness, that such a devise, if not too remote, would be good. *Mazyck v. Vanderhorst*, Bail. Eq. 48. *Bedon v. Bedon*, 2 Bail. 231, 248. *Adams v. Chaplin*, 1 Hill, Ch. 265, 280. See *Barksdale v. Gamage*, 3 Rich. Eq. 271, 276. The South Carolina cases in which it had been decided or said that there could be no executory devise after a fee simple conditional, *Bailey v. Seabrook*, Rich. Ch. Cas. 419; *Williams v. Caston*, 1 Strob. 130, 133; *Buist v. Dawes*, 4 Strob. Eq. 37, 48 *et seq.*; *Barksdale v. Gamage*, 3 Rich. Eq. 271, 274, seemed to rest on no valid reason, as was strongly intimated in the carefully considered opinion of Dorgan, C., in *Buist v. Dawes*, 4 Strob. Eq. 37, 48. The only reason given was in *Bailey v. Seabrook*, Rich. Ch. Cas. 419, viz., the rule that a limitation must always be construed, if it can be, as a remainder instead of as an executory devise; but as this limitation confessedly cannot be construed as a remainder, the rule seems rather a reason for construing it as an executory devise. In *Edwards v. Barksdale*, 2 Hill, Ch. 184, 197, 198, it was said by O'Neill, J., that if an estate which

wife after issue born between them who could inherit the estate. It has been questioned whether the estate vests in possession on the birth of the issue, or on the death of the wife.¹ Dower is the estate for life which a widow has in such land of which her husband was seised during the coverture as her issue, should there be any, could inherit. Anciently the more common form of dower seems to have been dower *ad ostium ecclesiæ* (of which dower *ex permissu patris* was a variety). By this a woman was endowed at the time of marriage with certain lands into which she could enter immediately upon her husband's death. This kind of dower has become entirely obsolete. The right of dower at common law is the right of a woman to have assigned to her by the heir one-third of the land in which she is dowable.

§ 16. (5) *Interests less than Ownership in Land of others.* — Interests in land owned by others, such as commons and other profits, ways and other easements, rents, etc., cannot, from their nature, be created by livery of seisin. They, therefore, lie in grant, that is, are created by deed, and consequently can begin *in futuro*.²

would otherwise be deemed a fee simple conditional is followed by an executory devise not too remote, the first estate must be construed to be an estate in fee simple. And it has now been held in South Carolina that there may be an executory devise limited on a fee simple conditional. *Powers v. Bullwinkle*, 33 So. Car. 293. *Selman v. Robertson*, 46 So. Car. 262. See *Buist v. Dawes*, before the Court of Errors, 4 Rich. Eq. 421, 496; *McCorkle v. Black*, 7 Rich. Eq. 407, 410, 419; *Bethea v. Bethea*, 48 So. Car. 440; *Barber v. Crawford*, 85 So. Car. 54. Cf. also *Whitworth v. Stuckey*, 1 Rich. Eq. 404; *M'Lure v. Young*, 3 Rich. Eq. 559; *Graham v. Moore*, 13 So. Car. 115; *Mangum v. Piester*, 16 So. Car. 316.

In *Fletcher v. Fletcher*, 88 Ind. 418, a deed of land to A. for life, and after his death to his children in fee simple, was held to give A. an estate in fee simple conditional, which on the birth of children became absolute. It is unnecessary to point out to the learned reader the errors in this opinion.

¹ The former view was adopted in *Foster v. Marshall*, 22 N. H. 491; the latter in *Jones v. Davies*, 5 H. & N. 766; 7 H. & N. 507. See 1 *Tiffany, Real Prop.*, § 210. Cf. *Doyle v. Amer. Fire Ins. Co.*, 181 Mass. 139.

² By the common law, all interests in real estate that can be created by livery have to be so created, and are called corporeal hereditaments; interests that from

§ 17. Though interests in others' lands could at common law be created to begin *in futuro*, yet such interests *when once existing* could not be granted *in futuro*; and the same was true of existing reversions and remainders. Thus a rent might be granted to A. and his heirs, to begin ten years from date, and A. could transfer by grant the rent to B.; but A. could not grant the rent to B. to have it from and after A.'s death. So, again, if land had been conveyed to G. for life, remainder to H. and his heirs, H. could grant his remainder to I., but he could not grant to I. the remainder from and after H.'s death.¹ The reason given is that "if a reversion might be granted at a day to come, from thence it would follow that the grantor would have a particular estate in it, in the meantime, of his own creation, which cannot be by the rule of law that a man should be lessor to himself."²

§ 17 *a*. *Escheat*. — When tenant in fee simple dies without heirs (which may happen either *per defectum sanguinis* or *per delictum tenentis*) the land falls by escheat to the lord of whom it is held.³

their nature do not admit of livery can be created or conveyed by deed, and are called incorporeal hereditaments. This genus of incorporeal hereditaments contains two species: (1) Existing future estates, i. e. remainders and reversions; (2) *jura in alieno solo*, i. e. profits, easements, rents, etc. The tie uniting these two very unlike classes is that neither of them lies in livery. Cf. Mr. Sweet's note on Corporeal and Incorporeal Hereditaments in Challis, Real Prop. (3d ed.) 48.

¹ Buckler *v.* Harvy, Cro. El. 450, 585; Moore, 423; 2 Co. 55 *a*. See Swift *v.* Heirs, March, 31; *sub nom.* Vicars Choral de Litchfield *v.* Ayres, W. Jones, 435; *sub nom.* Swyft *v.* Eyres, Cro. Car. 546; 1 Roll. Ab. 828, pl. 3. Prisot, C. J.,

38 Hen. VI. 38; Vavasour, J., 8 Hen. VII. 3 *b*; Throckmerton *v.* Tracy, 1 Plowd. 145, 152, 155, 156; Wrotesley *v.* Adams, Id. 187, 197; Plowd. Qu. § 302; 1 Roll. Ab. 829, pl. 7. Cf. § 279, *post*.

² 1 Plowd. 155. This seems the real reason why the Rule was established, and not that given in 1 Preston, Est. 216–220. Challis, Real Prop. (3d ed.) 104, 112.

Under the Statutes of Uses and Wills existing incorporeal hereditaments can now be transferred *in futuro*; for a shifting use or executory devise does not create a particular estate in the settlor or in the testator's heirs, but the settlor or heirs retain the fee until the future event happens, upon which the fee shifts. § 54, *post*.

³ See §§ 115 *a*, 205, note, *post*.

2. *Statute De Donis.*

§ 18. In 1285, by St. Westm. II., 13 Edw. I. c. 1, *De Donis Conditionalibus*, estates in fee simple conditional were turned into estates tail, the donor's possibility of reverter became a reversion, and a remainder could be created after a fee tail as after a life estate. Interests were thus secured to future generations of a family, and, failing these, to the remainderman or donor, which could not be destroyed by the tenant for the time being of the estate.

§ 19. By the gradual operation of (1) the doctrine of Collateral Warranty; (2) the allowance, by the courts, of Common Recoveries as a means of barring estates tail;¹ and (3) the Statutes of Fines, 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36, estates tail became alienable, and the reversions and remainders after them destructible.² The alienation of estates tail is at present regulated in England by St. 3 & 4 Wm. IV. c. 74, by which fines and recoveries were abolished and simpler modes of assurance substituted. Wherever in any of the United States estates tail have been preserved, simpler forms of conveyance have also generally taken the place of fines and recoveries.³

¹ *Taltarum's Case* (1472), 12 Edw. IV. 19.

² Digby, *Hist. Law Real Prop.* c. 5, § 2. 2 Bl. Com. 348-364. Wms. *Real Prop.* (22d ed.), Part I, c. 3.

³ See, for example, Me. Rev. Sts. (1903), c. 75, § 7; 2 Mass. Rev. Laws, c. 127, §§ 24-27; R. I. Gen. Laws (1909), c. 252, §§ 5, 14-17; Del. Rev. Sts. (1893), c. 83, § 27; 1 Md. Pub. Gen. Laws (1904), Art. 21, § 24.

The Statute *De Donis* was brought by the colonists to America. On Dec. 12, 1712, South Carolina passed an Act declaring that certain British Statutes particularly

mentioned should be in force; and, § 10, that all others should be declared impracticable. This Act does not mention the Statute *De Donis*; and the Statute is therefore not in force in that State. See § 14, *ante*. Mr. Dane, 6 Dane, Ab. 606, says that this Act applied also to North Carolina, Tennessee, Georgia, Alabama, and Mississippi; but either it did not apply to them, or the enumeration of Statutes in the Act did not include all those in force, for in all the above States the Statute *De Donis* seems to have been in force until repealed by later legislation. N. C. St. 1749, c. 46; St. 1784, c. 204, § 5.

3. Statute *Quia Emptores*.

§ 20. At common law a tenant in fee could either, (1) with the consent of the lord, substitute another in his own place

Patterson v. Patterson, 1 Hayw. 163. *Den d. Lane v. Davis*, Id. 277. *Minge v. Gilmour*, Id. 279. *Moore v. Bradley*, 2 Hayw. 142. *Polk v. Faris*, 9 Yerg. 209, 234. Ga. Const. (1777), Art. 51. Ga. Const. (1789), Art. 4, § 6. Ga. St. Feb. 16, 1799, § 5; St. Dec. 21, 1821. *Gray v. Gray*, 20 Ga. 804. *Hertz v. Abrahams*, 110 Ga. 707. *Davis v. Hollingsworth*, 113 Ga. 210. Ala. St. Dec. 22, 1812, § 10. *Simmons v. Augustin*, 3 Port. 69. Miss. St. Dec. 22, 1812, § 10; St. June 13, 1822, § 24. *Jordan v. Roach*, 32 Miss. 481, 616.

Estates tail can still be created in Maine, Massachusetts, Rhode Island, Delaware, and Maryland. In Pennsylvania they can no longer be created, but those existing at the time of the passage of the St. of April 27, 1855, are not disturbed. *Reinhart v. Lantz*, 37 Pa. 488.

In Connecticut, an estate to one and the heirs of his body was held to give neither a fee simple conditional nor an estate tail; but to give "an absolute estate in fee simple to the issue of the first donee in tail." The Statute of 1784 (Conn. Gen. Sts. 1902, § 4027), to this effect, is said to have been declaratory of the common law of the Colony. *Welles v. Olcott*, Kirby, 118. *Chappel v. Brewster*, Id. 175. *Hamilton v. Hempsted*, 3 Day, 332. See Ohio Rev. Sts. (1880), § 4200.

The Supreme Court of Oregon has held that the Statute *De Donis* is not in force in that State; they

leave undetermined the question whether a gift to A. and the heirs of his body gives him a fee simple conditional. *Rowland v. Warren*, 10 Oreg. 129. The same thing occurred in *Pierson v. Lane*, 60 Iowa, 60; but in *Kepler v. Larson*, 131 Iowa, 438, the Supreme Court of Iowa said that the old conditional fees still existed in that State, and it was so held in *Sagers v. Sagers*, 138 N. W. Rep. (Iowa) 911.

In most of the United States estates tail have, at the present day, been abolished by Statute expressly or impliedly. Mr. Stimson, in his valuable book on American Statute Law, says (§ 1313) that "in twelve States and Territories the laws are silent, and estates tail would logically seem to be preserved as at common law (the learned author means under the Statute *De Donis*), New Hampshire, Iowa, Kansas, Nebraska, Texas, Oregon, Nevada, Washington, Idaho, Montana, Wyoming, South Carolina." But, as shown above, estates tail do not exist in Iowa, Oregon, or South Carolina, and in New Hampshire it is held that they have been done away with by implication from the Statutes. *Merrill v. Amer. Baptist Missionary Union*, 73 N. H. 414. As to the other States Mr. Stimson's remark is just, that in many of them estates tail would presumably not be recognized by the courts. Words which under the Statute *De Donis* would create an estate tail give, by statute, in

to hold the fee of the lord;¹ or (2) by subinfeudation, grant the land to be held of himself. But the former mode could be employed only when the feoffee was to hold the same fee that the feoffor had held; and, therefore, when the feoffor conveyed a part only of his land the feoffee had to hold of him; and so, when the feoffor conveyed a life estate, or a fee with a special limitation (e. g. to A. and his heirs, tenants of the Manor of Dale), or (after the Statute *De Donis*) an estate tail, the feoffee held directly of him.² All reversions and possibilities of reverter were therefore always in the hands of the persons of whom land was held; for though a reversion could be alienated, it carried with it the lordship of the particular estate; and a possibility of reverter could not be alienated.³

§ 21. The St. Westm. III. 18 Edw. I. c. 1 (1289), known as the Statute *Quia Emptores Terrarum*, enacts that on all conveyances in fee the tenant shall not hold of the grantor, but of the grantor's lord. This put an end to subinfeudation. The Statute does not affect gifts in tail or for life.⁴ And, as lands in frankalmoign could not be held of anyone but the grantor,⁵ land could not be granted in frankalmoign after the Statute, except by the King.⁶ We have here to consider the effects of the Statute on the future interests allowed by the common law.⁷

§ 22. Before dealing with this, however, it will be convenient to see how far the Statute *Quia Emptores* is in force in the United States; and a question preliminary to this

some States, an estate in fee simple; in others an estate for life in the first donee, with remainder in fee to his children or his heirs. See Stimson, *ubi sup.*; 17 Harv. Law Rev. 305-316; 13 Yale Law J. 267. On the effect of the Illinois Statute see Kales, *Fut. Int. in Ill.*, §§ 270-273; 1 Ill. Law Rev. 323. In Hawaii there is neither fee tail nor fee simple conditional. *Rooke v. Queen's Hospital*, 12 Hawaii, 375.

¹ Bract. 81. 2 Inst. 65.

² 2 Inst. 65; Digby, *Hist. Law Real Prop.* c. 4, § 5. 1 P. & M. *Hist. Eng. Law* (2d ed.) 329-331.

³ See §§ 13, 14, *ante*.

⁴ See § 3 of the Statute *ad fin.*; 22 Edw. I. p. 641; 2 Inst. 504, 505; Digby, *Hist. Law Real Prop.* c. 4, § 5, note.

⁵ Lit. § 141. Perk. § 260.

⁶ Lit. § 140.

⁷ See § 7, *ante*.

inquiry is: How far does tenure exist in the United States? For it is idle to inquire whether a Statute directing of whom land shall be held is in force, if land cannot be held at all. This preliminary question has been much discussed. Land was held of the Crown in the Colonial times, and it does not seem that so fundamental an alteration in the theory of property as the abolition of tenure would be worked by a change of political sovereignty. Tenure still obtains between a tenant for life or years and the reversioner; and so in like manner, it is conceived, a tenant in fee simple holds of the chief lord, that is, of the State.¹

§ 23. The subject has, however, in many States been affected by legislation or decision.

Connecticut. — "Every proprietor in fee simple of lands has an absolute and direct dominion and property in the same."²

New York. — "All lands within this State are declared to be allodial, so that, subject to the liability to escheat, the entire and absolute property is vested in the owners, according to the nature of their respective estates; and all feudal tenures, of every description, with all their incidents, are abolished."³

New Jersey. — The St. of Feb. 18, 1795,⁴ declares that the purchaser of lands shall hold them of the chief lord, if there be any, of the fee; that all tenures are turned into free and common socage; but that this shall not take away "any rents certain, or other services incident or belonging to tenure in common socage, due or to grow due to this State, or any mean lord, or other private person, or the fealty and distresses incident thereunto;" and that the tenure of all grants made

¹ Sharswood, Law Lect. VIII. 207-232. Hoff. Leg. Out. 593. *United States v. Repentigny*, 5 Wall. 211, 267. Cf. 2 Bl. Com. (Sharswood's ed.) 77, note. But see 1 Washb. Real Prop. 39-42; 2 Bl. Com. (Cooley's ed.) 102, note.

² St. Oct. 1793. See St. 1821,

tit. 56, c. 1, § 1, note; Gen. Sts. (1902), § 4025.

³ Rev. Sts. pt. 2, c. 1, tit. 1, § 3. This Statute had been preceded by St. Feb. 20, 1787, which was identical with the New Jersey Statute, *infra*. See *Cornell v. Lamb*, 2 Cowen, 652; Hoff. Leg. Out. 595.

⁴ 1 Gen. Sts. (1895), pp. 879, 880.

or to be made by the State shall be "allodial and not feudal," and "in free and pure allodium only."¹ The statement in 1 Washb. Real Prop. * 40, that tenure does not exist in New Jersey, is incorrect.

Pennsylvania. — In *Wallace v. Harmstad*² it was held that tenure does not exist in Pennsylvania. This will be considered below in connection with the Statute *Quia Emptores*.³

Maryland. — In *Matthews v. Ward*⁴ it is said that after the Revolution "lands became allodial, subject to no tenure."⁵

Virginia. — Tenures were abolished by St. 1779, c. 13.⁶

Ohio, Indiana, Illinois, Michigan, and Wisconsin were formed out of the Northwest Territory, which was ceded by Virginia to the United States in 1784, subsequent to the abolition of tenure. In these States, therefore, there would seem to have been originally no tenure.⁷ The government of the Northwest Territory, July 14, 1795, passed an Act declaring that the common law of England and all Acts of Parliament of a general nature made in aid of the common law prior

¹ "Allodial" land is now usually employed to mean land held of no one. 2 Bl. Com. 45, note, 47, 105. See Wright, Tenures, 146, 147; Gilbert, Tenures (4th ed.) 352, Watkins's note 5; Somner, Gavelkind, 109-111, 126. This is the sense in which it is employed in the New York Revised Statutes, *ubi sup.* Used with this meaning the expression "allodial tenure" is nonsense. But "allodial land" was also employed to mean land which, though held of a lord, was not subject to any services. "Erat alodium prædium non modo ab omni præstatione liberum, sed a quolibet servitio reali et personali immune, licet illius possessor dominum agnosceret, a quo illud tenebat in feudum honoratum." Ducange, *Glos. Alodis*. Spelm. *Glos. Aloarius*,

sub fin. Cf. Ducange, *Glos. voc. cit. passim*; Co. Lit. 1 b, 5 a, 65 a, Harg. note; Allen, Prerog. 196; Digby, Hist. Law Real Prop. c. 1, sect. I. §§ 1, 4. In the New York Statute of 1787, and the New Jersey Statute, the word seems to be employed in this latter sense. See *sub Georgia, post.* But cf. 3 Kent, Com. 513, note (a).

² 44 Pa. 492.

³ See § 26, *post.*

⁴ 10 G. & J. 443, 451.

⁵ See Hoff. Leg. Out. 594.

⁶ 10 Hen. St. 50, 64, 65. See 2 Minor, Inst. (4th ed.) 79; 1 Lomax, Dig. 539.

⁷ See Penny v. Little, 4 Ill. 301, 304, 305; Lavalle v. Strobel, 89 Ill. 370, 380. Cf. McCool v. Smith, 1 Black, 459, 468; Bates v. Brown, 5 Wall. 710, 714.

to 4 Jac. I. (which was the date of the settlement of Virginia), "and also the several laws in force in this Territory," should be in full force.¹ It is doubtful how far this republication of the common law and re-enactment of the English Statutes were within the power of the Territorial Government.² If the Act was valid, then tenure, and at the same time the Statute *Quia Emptores*, were re-established in the Northwest Territory. After Ohio was set off as a State, its Legislature, Feb. 14, 1805,³ passed a Statute repealing the Act of the Territorial Government, and then re-enacting it. But on Jan. 2, 1806, the Legislature of Ohio passed an Act⁴ repealing so much of the last Act as declared that the common law of England and English Statutes should be in force. It would seem, therefore, that the law in Ohio was relegated to its condition before the Territorial Act of 1795, and that therefore there is no tenure in that State.⁵ On Ohio becoming a State in 1802, all the rest of the original Northwest Territory was included within the Territory of Indiana. The Legislature of this Territory in 1807 enacted that the common law, and the British Statutes made in aid thereof, prior to 4 Jac. I., should be considered in full force, and this provision has stood on the Statute Book of the Territory and of the State of Indiana ever since.⁶ If, therefore, tenure has been restored in Indiana, the Statute of *Quia Emptores* has been restored with it. In 1809 the Territory of Illinois was set off from Indiana, and a Statute similar to that of Indiana has always continued on the Statute Book of Illinois.⁷ The Territory of Michigan was set off from the Territory of Indiana in 1805. In 1821

¹ 1 Chase, St. 190, 191.

² 1 Chase, St. 190, note. *Doe d. Thompson v. Gibson*, 2 Ohio, 339. *Helfenstine v. Garrard*, 7 Ohio, pt. 1, 275. *Carroll v. Olmsted*, 16 Ohio, 251, 260. *Knapp v. Thomas*, 39 Ohio State, 377, 385.

³ 1 Chase, St. 512.

⁴ 1 Chase, St. 528.

⁵ 11 Am. Jur. 94, 95. *Walker*,

Am. Law, § 124. Cf. *Crawford v. Chapman*, 17 Ohio, 449.

⁶ 1 Burns' Ind. Statutes (1908), § 236. Cf. *Stevenson c. Cloud*, 5 Blackf. 92; *McCord v. Ochiltree*, 8 Blackf. 15, 19; *Short v. Stotts*, 58 Ind. 29; *Ledgerwood v. The State*, 134 Ind. 81, 84.

⁷ Ill. Rev. Sts. c. 28, § 1. See the cases cited in note 6, *supra*.

a law was enacted in very singular language; it provided "that no Act of the Parliament of England, and no Act of the Parliament of Great Britain, shall have any force within the Territory of Michigan: *Provided*, That all rights arising under any such Act shall remain as if this Act had not been made; the same being adopted from the laws of one of the original States, to wit, the State of Virginia, as far as necessary and suitable to the circumstances of the Territory of Michigan."¹ And in the same year² it was also enacted that estates tail shall be abolished, and all persons then seised in tail should be deemed to be seised of an allodial estate. Whatever the intention of these statutes may have been, it seems to be now held in Michigan, that if the Statute of *Quia Emptores* is not in force there, it is because there is no need of it, and that subinfeudation would not be allowed in that State.³ It is unnecessary to enter upon the earlier history of Wisconsin law for the Constitution of the State provides that land shall be allodial.⁴

West Virginia. — This State was not set off from Virginia till 1862, and carried with it the law of Virginia. Tenure, therefore, has never existed in this State.

Kentucky. — In this State titles are now declared by Statute to be allodial.⁵

South Carolina. — The Statute of Dec. 12, 1712,⁶ § 5, declared that the only tenure of lands in South Carolina was that of free and common socage. The statements, therefore, in 1 Washb. Real Prop. * 40, and Smith on Landl. and Ten. (Am. ed.) 6, note, that there is no tenure in South Carolina appear to be incorrect.

Georgia. — The Code of 1911, § 3623, reads thus: "*Allodial tenure.* The tenure by which all realty is held in this State is under the State as original owner; it is without service of

¹ 1 Mich. Terr. Laws, 900.

² 1 Mich. Terr. Laws, 815.

³ *Mandlebaum v. McDonell*, 29 Mich. 78, 95.

⁴ Wis. Const. (1848), Art. 1, § 14.
Barker v. Dayton, 28 Wis. 367, 384.

⁵ Ky. Gen. Sts. (1873), c. 63, § 2.

⁶ Grimké's Laws, 99. Rev. Sts. 1893, § 1872.

any kind, and limited only by the right of eminent domain remaining in the State." This is a legislative declaration that tenure exists.¹

Minnesota. — The Constitution (1857)² declares that all land shall be allodial.

Iowa. — In 1834 Iowa was made part of the Territory of Michigan; in 1836 it was attached to the Territory of Wisconsin; and in 1838 it was made a separate Territory. It is probable that should any case arise it will be held in Iowa, as in Michigan, that if the Statute of *Quia Emptores* is not in force in that State, it is because there is no need of it.³

Arkansas. — The Constitution (1874) declares that all lands are "allodial" and prohibits "feudal tenures of every description with all their incidents."⁴

It is not improbable that the courts of other States may follow that of Maryland, and declare tenure abolished without legislative aid; but as yet the Maryland case (except in Pennsylvania)⁵ finds no support elsewhere.

§ 24. In those States where tenure no longer obtains, there can be no question whether the Statute *Quia Emptores* is in force; its subject-matter has ceased to exist. In this condition are at least Connecticut, New York,⁶ Maryland,⁷

¹ On the use of the expression, "allodial tenure," see § 23, note 1, p. 17, *ante*.

² Art. 1, § 15. Cf. *Minneapolis Mill Co. v. Tiffany*, 22 Minn. 463; *Dutcher v. Culver*, 24 Minn. 584, 617.

³ See *Pierson v. Lane*, 60 Iowa, 60. Cf. *O'Ferrall v. Simplot*, 4 Iowa, 381; *Lorman v. Benson*, 8 Mich. 18, 25; *Coburn v. Harvey*, 18 Wis. 147; *Webster v. Morris*, 66 Wis. 366, 376, note, 390; *Gilbert v. Stockman*, 81 Wis. 602.

⁴ Art. II. § 28.

⁵ As to Pennsylvania, see § 26, *post*.

⁶ It has been sometimes said

that the Statute *Quia Emptores* was not in force in New York even before the Revised Statutes. *Jackson v. Schutz*, 18 Johns. 174, 179, 180. *De Peyster v. Michael*, 6 N. Y. 467, 502, 503. But see *Denio, J.*, in *People v. Van Rensselaer*, 9 N. Y. 291, 338, and in *Van Rensselaer v. Hays*, 19 N. Y. 68, 71-75; 1 Chalm. Col. Op. 129 (Am. ed. 149); and 25 Alb. L. J. 169.

⁷ See Chancellor Kilty's English Statutes in Maryland, 146; and the Charter to Lord Baltimore, Lucas, Chart. 95. Cf. *Thomas v. Hamilton*, 1 H. & McH. 190; *Matthews v. Ward*, 10 G. & J. 443, 450.

Virginia,¹ Ohio, Wisconsin, West Virginia, Kentucky, Minnesota, Arkansas.²

§ 25. In the States where there is no reason to question the existence of tenure, there seems as little reason to question the existence of the Statute *Quia Emptores*. There is no cause why this Statute should not have prevailed as generally as the Statute *De Donis*. Denio, J., in *Van Rensselaer v. Hays*,³ points out the absurdity of supposing that subinfeudation existed in the Colonies generally. In New Jersey the Statute was in force, and has been expressly re-enacted;⁴ Mr. Dane says⁵ that the Statute of *Quia Emptores* was "never adopted here" (*qu.* in Massachusetts). But no authority is cited for the proposition. The alleged non-existence of the Statute in North Carolina, Tennessee, Georgia, Alabama, and Mississippi rests upon the same ground as the alleged non-existence in those States of the Statute *De Donis*, which, as we have seen,⁶ wholly fails.⁷ In Indiana, Illinois, Michigan, and Iowa, either there is no tenure, or, if tenure exists, the Statute *Quia Emptores* exists also.⁸ There would seem to be, of the States in which tenure exists at the present day, but two in which the Statute *Quia Emptores* is not in force, — Pennsylvania and South Carolina.

§ 26. *Pennsylvania*. — By the Charter of 1681 the Crown granted to William Penn the power to grant land to be held of himself, his heirs and assigns, and not immediately of the Crown, the Statute *Quia Emptores* notwithstanding.⁹ And in *Ingersoll v. Sergeant*¹⁰ (1836), a very elaborately argued and

¹ The Statute *Quia Emptores* was in force in Virginia, 1 Chalm. Col. Op. 121 (Am. ed. 142); but was repealed by St. 1792, c. 147, after tenures had been abolished, 1 Lomax, Dig. 53C.

² See *Mandlebaum v. McDonell*, 29 Mich. 78, 95.

³ 19 N. Y. 68, 75.

⁴ Chalm. 1 Col. Op. 123 (Am. ed. 143). See § 23, *ante*. As to

New York and Virginia before the abolition of tenure, see notes to § 24.

⁵ 4 Dane, Ab. 504.

⁶ § 19, note 3, *ante*.

⁷ And see Martin's English Statutes in North Carolina (1792), 39.

⁸ § 23, *ante*.

⁹ Lucas, Chart. 106, 107.

¹⁰ 1 Whart. 337.

carefully considered case, it was held that the Statute *Quia Emptores* was not in force, and that therefore rent reserved on a conveyance in fee simple was rent service and could be apportioned. This decision has always been deemed a landmark in the law of Pennsylvania; but in *Wallace v. Harmstad*¹ (1863) the Court ruled that there was no tenure in the State.² This ruling was unnecessary to the decision of the case, and has been far from meeting with universal acceptance. It has been severely criticised by Chief Justice Sharswood in his Law Lectures,³ and by Mr. Cadwalader in his treatise on Ground Rents.⁴ Their criticisms seem just. If *Wallace v. Harmstad* had professed to overrule *Ingersoll v. Sergeant*, the ruling, whether right or wrong, would be plain enough. But on the contrary it is said: "That ground rent is a rent service was fundamental in *Ingersoll v. Sergeant*, a case which has been so often recognized and followed as to have become a rule of property."⁵ In fact *Wallace v. Harmstad* is unintelligible. To speak of rent service, or of the Statute *Quia Emptores*, in a State where tenure is non-existent, is an absurdity; rent service and the Statute *Quia Emptores* necessarily imply tenure. They are meaningless terms without it. Considering the high authority which has always attached to *Ingersoll v. Sergeant*, there may be reason, in spite of *Wallace v. Harmstad*, to believe that tenure still exists in Pennsylvania, and that the Statute *Quia Emptores* does not.

§ 26 a. *Delaware*. — Delaware was granted by the Duke of York to William Penn (though it appears to have been outside of the patent granted to the Duke), but it was never incorporated into Pennsylvania. There was no exemption from the Statute *Quia Emptores* in the patent to the Duke, and the Statute was therefore in force over the land held under the patent, and presumably in Delaware.⁶

¹ 44 Pa. 492.

² Cf. Huston, Land Titles in Pa. 374, and see *Stuart v. Easton*, 170 U. S. 383, 393.

³ Pp. 207-232.

⁴ Chap. 1. See Jackson & Gross, Landl. & Ten. §§ 1-11; Foulke, Treatise, § 73, note.

⁵ 44 Pa. 495.

⁶ Chalm. 1 Col. Op. 123 (Am.

§ 27. *South Carolina*. — On Dec. 12, 1712, was passed an Act to put in force in the Province the English Statutes therein particularly mentioned; the tenth section of this Act declared that all the English Statutes not enumerated and made of force in the Province by the Act were impracticable in the Province. The Statute *Quia Emptores* was not mentioned in this Act, and is therefore not law in South Carolina.

§ 28. The important result of this inquiry, for our present purpose, is that in all of the United States, with the exception of South Carolina and perhaps Pennsylvania, land, if held at all, can be held of none but the State; for in all the States, with the two exceptions, either there is no tenure, or, if there is tenure, the Statute *Quia Emptores* is in force.¹

§ 29. We recur now to the question stated above,² namely, the effect of the Statute *Quia Emptores* on the future interests allowed by the common law or the Statute *De Donis*.³ *Remainders and Reversions*. — If tenant in fee grants estates for life or in tail and subsequently grants the reversion in fee, the tenants for life or in tail hold of the grantee of the reversion after as before the Statute *Quia Emptores*; but if he grants particular estates and, by the same conveyance, grants the ultimate remainder in fee, the tenants of the particular estates, as well as the ultimate remainder-man, hold, since the Statute, of the chief lord.⁴

§ 30. *Interests arising on Condition broken*. — These were not affected by the Statute *Quia Emptores*. The right of the feoffor to enter and substitute himself for the feoffee is not

ed. 143). It would seem that a notion must have prevailed that the Statute *Quia Emptores* was not in force, for the Delaware St. of 24 Geo. II. c. 119, § 13, speaks of land escheating to the immediate landlord. At present, by the Rev. Sts. of 1852, c. 82, § 1, all land in Delaware escheats to the State.

¹ Where there is no tenure, the land of one dying without heirs

passes to the State, not by escheat, but in the same way in which the personal property of one who dies without next of kin passes to the State. See § 205, note, *post*.

² § 21, *ante*.

³ See §§ 7, 18, *ante*.

⁴ Anon., Dyer, 362 b, pl. 19. Lit. §§ 215-217. 2 Inst. 505. Leake, Land Law, 42, 321. Challis, Real Prop. (3d ed.) 22.

a reversionary right, nor is it dependent upon tenure.¹ The validity of conditions attached to fees has been repeatedly recognized in America.²

§ 31. *Possibilities of Reverter*. — These rights, as their name implies, were reversionary rights; but a reversionary right implies tenure, and the Statute *Quia Emptores* put an end to tenure between the feoffor of an estate in fee simple and the feoffee. Therefore, since the Statute, there can be no possibility of reverter remaining in the feoffor upon the conveyance of a fee; or, in other words, since the Statute, there can be no fee with a special or collateral limitation; and the attempted imposition of such a limitation is invalid.³ The distinction between a right of entry for condition broken and a possibility of reverter is this: after the Statute, a feoffor, by the feoffment, substituted the feoffee for himself as his lord's tenant. By entry for breach of condition, he avoided the substitution, and placed himself in the same position to the lord which he had formerly occupied. The right to enter was not a reversionary right coming into effect on the termination of an estate, but was the right to substitute the estate of the grantor for the estate of the grantee. A possibility of reverter, on the other hand, did not work the substitution of one estate for another, but was essentially a reversionary interest, — a returning of the land to the lord of whom it was held, because the tenant's estate had determined.⁴

¹ Lit. §§ 325, 347. Co. Lit. 202. Doe d. Freeman v. Bateman, 2 B. & Ald. 168.

² See especially Van Rensselaer v. Ball, 19 N. Y. 100; Same v. Dennison, 35 N. Y. 393, 400.

³ See article on Determinable Fees in American Jurisdictions, by J. M. Zane, 17 Harv. Law Rev. 297; 30 Cyc. Law & P., 1474, note 40.

⁴ It has been suggested that the possibility of reverter passed to the chief lord, but as to this see § 776,

post. The Statute having no application to the King, he could of course still grant determinable fees. Rents charge are not held of anyone; and if A. who has a rent charge in fee grants it for a less estate to B., B. does not hold of A.; so it would seem that the Statute *Quia Emptores* does not inhibit a rent charge being created *de novo* in fee simple determinable, nor an existing rent charge being granted in fee simple determinable; and that the law is the same as to other like incor-

§ 32. In accordance with the doctrine of the foregoing section, no possibility of reverter after a determinable¹ fee has been sustained in England since the Statute *Quia Emptores*. A fee simple subject to a conditional limitation, that is, to a shifting use or executory devise, is sometimes called a determinable fee; but this is not technically exact. A determinable fee is one subject to a special limitation; that is, a limitation which marks the original bounds of the estate, and after which, in case of a fee, no other estate can be granted. A conditional limitation, as the term is commonly used, cuts off the first estate and introduces another. An estate to A. and his heirs, tenants of the Manor of Dale, is an instance of a determinable fee. An estate to A. and his heirs, but if he dies unmarried, then to B. and his heirs, is a fee simple subject to a conditional limitation. Determinable fees were good at common law, but were done away with by the Statute *Quia Emptores*. Conditional limitations were not good at common law; they were first introduced by the Statutes of Uses and of Wills.²

§ 33. The effect, however, of the Statute *Quia Emptores* in putting an end to determinable fees has been often overlooked, though, as has just been said, no such fee has been actually sustained in England by decision since the Statute. The *dicta* of English judges which support or assume the validity of such fees since the Statute are as follows:—

(1) Choke, J.³ (1467): “As if I give land to a man to have to him and his heirs in fee so long as John A’Down has issue of his body, in that case the feoffee will hold of his Lord, etc.; yet if John A’Down dies without heir of his body, etc.,

poreal hereditaments, such as profits and easements in gross. There is next to nothing in the books on the subject; but cf. A. G. v. Cummins, [1906] 1 I. R. 406.

¹ In deference to Mr. Challis’s opinion, the employment of “qualified” as synonymous with “determinable” has been avoided.

See Challis, Real Prop. (3d ed.), c. 19.

² On the difference between a special limitation and a conditional limitation, and on the different meanings of the latter term, see Gray, Restraints on Alienation (2d ed.), § 22, note.

³ 7 Edw. IV. 12 a, pl. 2.

in that case I may well enter, etc. But not by escheat, etc., but because the feoffment is determined.”¹

(2) Counsel (1535) says:² “If I give land to you and to your heirs so long as such a tree shall live, that is a good fee simple determinable for the life of the tree, and I see no diversity in reason why a fee simple shall not be as well determined by the life of a man as by the life of a tree, for it is all one in reason. So it seems to me that, etc.” Baldwin (Chief Justice of the Common Pleas) “You say well.”

(3) *Poole v. Needham*³ (1608). Ejectment. J. was tenant in tail male, remainder in fee to T. T. granted his remainder to the Queen in fee, as long as any issue male of J. should live. J. suffered a common recovery, under which the plaintiff claimed, and J. died without issue. The defendant, as servant to T., entered. Judgment for the plaintiff. The Court held that the grant of the remainder to the Queen was void because the estate granted could never come into possession, and that therefore the recovery barred T.’s remainder. They seem to have been of opinion that the Queen did not take a fee simple absolute; that the fee simple determinable on the termination of the particular estate tail was void, because there was no possibility of advantage in it; but that if it had been a reversion that had been so granted to the Queen, the grant would have been good, on account of the attendant services, etc. T. having entered upon the plaintiff, the plaintiff was entitled to proceed against him in ejectment for disturbance of possession.⁴ If the grant to the Queen was void, then T.’s estate was barred by the recovery; if the grant to the Queen passed a fee simple absolute, then T. had no estate to be barred. The judgment for the plaintiff was therefore good *quacunqve via*, and the remarks of the Court on the Queen’s having been granted a determinable fee were *obiter*. In Noy’s report of

¹ See § 35, note 4, *post*.

² 27 Hen. VIII. 29, pl. 20.

³ Yelv. 149.

⁴ *Asher v. Whitlock*, L. R. 1 Q.

B. 1. *Perry v. Clissold*, [1907] A.

C. 73. Professor J. B. Ames in 3 Harv. Law Rev. 323–325.

this case,¹ it is said: "And this case was put by the justices. Land is given to A. and his heirs, so long as B. hath issue male, etc. B. dies, his wife being big with a son, who is afterwards born. Yet the estate of A. is determined, and judgment was given accordingly."

(4) *Liford's Case*,² (1614). In this case it is said: "A man may have an inheritance in fee simple in lands, as long as such a tree shall grow, 27 Hen. VIII. 29 b, because a man may have an inheritance in the tree itself." In 1 Roll. R. 95, 101, where the case is reported *sub nom. Stampe v. Clinton*, the expression is, "If land is given as long as an oak shall grow, it is an inheritance ('*tam diu que querke crescera ceo est inherit*')." It is not clear whether the remark is to be attributed to counsel or to the Court.

(5) *Pells v. Brown*³ (1620). Here Mr. Justice Houghton, in his argument, puts this case: "If a man give or devise lands to one and his heirs as long as J. S. hath issue of his body, he shall not, by recovery, bind him who made this gift, without making him a party by way of vouchee."

(6) *Gardner v. Sheldon*⁴ (1671). Vaughan, C. J., speaking to a point which he expressly declares is not material to the case, says:⁵ "An estate to a man and his heirs as long as John Stiles hath any heir, which is no absolute fee simple, is doubtless as durable as the estate in fee which John Stiles hath to him and his heirs, which is an absolute fee simple."⁶

(7) *Ayres v. Falkland*⁷ (1697). Treby, C. J., and Powell, J., say: "A man may have a possibility of reverter where he cannot limit a remainder; as if A. gives lands to B. and his heirs during the time that such an oak shall grow, he hath a possibility of reverter, though no remainder can be limited."

(8) *Idle v. Cook*⁸ (1705). Powell, J., says: "A fee tail was a fee-simple at common law; for there were three sorts

¹ P. 132.

⁶ See also pp. 269, 270.

² 11 Co. 46 b, 49 a.

⁷ 1 Ld. Raym. 325; *sub nom.*

³ Cro. Jac. 590, 593.

Eyres v. Faulkland, 1 Salk. 231.

⁴ Vaugh. 259.

⁸ 1 P. Wms. 70, 74, 75; 2 Ld.

⁵ P. 273.

Raym. 1144, 1148.

of fee-simples, absolute, qualified (which was to time only, *scil.* as long as such a tree stood, or as J. S. had heirs of his body;) and also fee-simple conditional, which was limited as to the heirs inheritable." He then states the effect of the Statute *De Donis* on the last class. His statement is correct as to the law existing before the passage of the Statute *De Donis*, which, it will be remembered, was before the date of the Statute *Quia Emptores*.

(8 a) *Attorney-General v. Pyle*¹ (1738). A freehold messuage was devised to the charity-school at R., the rents and profits to be applied for the benefit of the school, so long as it should "continue to be endowed with charity." Lord Hardwicke, C., said: "Where a sum of money is given to a charity, so long as it shall continue to be endowed with charity, it is only given *quousque*, and when it ceases, if it is a gift of real estate, it shall fall into the inheritance for the benefit of the heir, if personal, into the *residuum*," and he declared that the rents and profits of the messuage ought to be applied to the benefit of the charity-school at R., "so long as the said charity-school shall continue to be endowed with charity," and he decreed the heir of the testator "to convey the said messuage to the other defendants, the trustees of the charity." It would seem that the legal estate conveyed to the trustees was a fee simple, and that any interest of the heir was only equitable, as a resulting trust.²

(9) *Lethieullier v. Tracy*³ (1754). Lord Hardwicke is reported by Atkins and Ambler to have said that if an estate is given to trustees until A.'s reaching twenty-one, and on A.'s attaining that age, then to him, the trustees take a determinable fee with a vested remainder to A.; but in Ambler he is previously made to call the estate of the trustees a chattel

¹ 1 Atk. 435.

² See *In re Randell*, *infra*; §§ 327, 603 *i. post.* The author's learned friend, T. Cyprian Williams, Esq., has had the kindness to examine the Registrar's Book

for him, and finds the order and decree to be as stated in Atkins.

³ 3 Atk. 774; *Ambl.* 204; 3 Kenyon, 40.

interest, and it seems incredible that Lord Hardwicke should have spoken of a vested remainder after a determinable fee.¹

(10) *Wellington v. Wellington*² (1768). Here, on a devise upon default of issue of the testator to trustees until debts and legacies were paid and then to A., the Court of King's Bench certified that the trustees took a determinable fee, but the only point in issue was whether the trustees took a present or a future estate. There is no opinion.³

(11) *A. G. v. Cummins*.⁴ The Crown granted certain quit-rents to A. and his heirs till he should be paid £5,000. Palles, C. B., in delivering the opinion held that the Crown had a possibility of reverter in the quit-rents. He did not refer to the Statute *Quia Emptores*, and there was no need that he should, for the Statute has no application to grants by the Crown.

§ 34. Possibilities of reverter have also been spoken of by counsel and text-writers as if they were valid interests, without paying any regard to the Statute *Quia Emptores*.⁵ But the English books reveal no actual case since the passing of the Statute down to modern times, in which a determinable fee with a possibility of reverter has been held to have been created;

¹ See Butler's note to Fearn, C. R. 226; Blunt's note to Ambl. 206, 207; and the note to Warter v. Hutchinson, 1 B. & C. 742.

² 1 W. Bl. 645; 4 Burr. 2165.

³ See also Anon., Dyer, 300 b, where the case referred to by the judges seems to have been simply one of a springing use; and Commissioners of Donations v. De Clifford, 1 Dr. & W. 245.

⁴ [1906] 1 I. R. 406.

⁵ 27 Hen. VIII. 29, pl. 20. *Walshingham's Case*, 2 Plowd. 557. *Edward Seymour's Case*, 10 Co. 97 b. *Anon.*, Jenk. Cent. 5. *Hall v. Deering*, Hardr. 148. *Cardigan v.*

Armitage, 2 B. & C. 202. *Co. Lit.* 1 b, 27 a. *Shep. Touch.* 101. 1 *Prest. Est.* 431-433, 440-444, 481, 482, 508, 509; and many modern authors. Mr. Preston, *loc. cit.*, has a list of instances of determinable fees, and this list is given in a revised form by Mr. Challis, *Real Prop.* (3d ed.) 254-260, who says it is a "list of determinable or collateral limitations, which have been actually used or proposed in books of authority to be used in the limitation of determinable fees." It is believed that § 33, *ante*, contains all the *dicta* of judges included in Mr. Challis's list.

and the learned reader need not be reminded that little reliance is to be placed on statements, however often repeated, which have never been brought to the test of decision. "The mere statement and restatement of a doctrine, the mere repetition of the *cantilena* of lawyers, cannot make it law, unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle."¹

§ 35. On the other hand, in *Christopher Corbet's Case*, in the Common Pleas, as reported by Sir Edmund Anderson, the Chief Justice,² where the question was whether a proviso for the cesser of an estate tail upon an attempt to bar the entail was void, the Chief Justice, in his opinion, remarks:³ "Intendments should be guided by the rules of the law, and not by idle conceits, and to prove this further, 13 Hen. VII., 11 Hen. VII., 21 Hen. VI. fol. 37,⁴ it is held, and the law seems plain, that if land be given to one and his heirs so long as J. S. has heirs of his body, the donee has a fee and can alien it, notwithstanding there be a condition that he shall not alien; and 11 lib. Assize, pl. 8,⁵ a like case is put and held as above: and there if land be given to one and his heirs so long as J. S. or his heirs may enjoy the Manor of D., these words (so long) are utterly vain and idle, and do not abridge the estate . . . and yet it is to be admitted that one may have an estate in fee determinable, but never by the act and consent of the parties, without any entry for condition broken or title defeasible; and to show briefly how this will be is now convenient,

¹ O'Connell v. The Queen, 11 Cl. & F. 373.

² 2 And. 134.

³ Pp. 138, 139.

⁴ These citations are corrected by Mr. Sanders, 1 Uses (5th ed.) 210, into 13 Hen. VII. Easter Term, fol. 24; 11 Hen. VII. pl. 25; 21 Hen. VI. Hil. pl. 21. The only one of importance is the first, where we find this colloquy in the Common Pleas. Vavasour, J., "A

condition to the donee in tail at the Common Law, and to the feoffee of a fee simple, so long as J. at S. has issue; in these cases the condition is void." Townshend, J., "It seems the condition in both cases is good."

⁵ Citing a case where there was a grant of a rent "as long as the grantor and his assignees should hold the house, etc., and it was adjudged freehold, etc."

and it will be if the lord of a villein being tenant in tail enters on the land, etc., he and his heirs will enjoy the land so long as the villein has issue, and then his estate will determine; so he who recovers rent against a tenant in tail, '*que ill teign in tail*' [out of what he holds in tail?]; or [suppose] that tenant in tail of land be attainted of treason, the King will have a fee of the land entailed determinable on death without issue, and has no greater estate; but these estates last mentioned are not made by the first creation of these estates, but by matter coming afterwards by other means."¹

§ 36. Mr. Sanders was the first author to distinctly recognize, or at any rate to distinctly state, that the Statute *Quia Emptores* put an end to determinable fees.² He says that his remarks are taken from an opinion of his own, "which was subsequently well considered by two gentlemen of eminence at the bar, and signed by them." The Commissioners on Real Property (Sir John Campbell and Messrs. Tinney, Duval, Hodgson, Duckworth, Brodie, and Tyrrell, all, except the chairman, among the most eminent real-property lawyers of their time), in their third Report, made in 1832,³ speaking of a devise of an estate to A. B. and his heirs, on condition that they use the name and arms of C. D., say: "Some have thought that the will passed a fee simple, determinable upon the non-performance of the condition; but it was not a de-

¹ When a tenant in tail makes a conveyance, e. g. a feoffment, which operates as a discontinuance, but leaves to the issue, or at any rate to the reversioner or remainderman, the right to a formedon, the grantee has a base fee which, while it lasts, descends to his heirs. Leake, *Land Law*, 40, 319. Challis, *Real Prop.* (3d ed.), c. 22. As Anderson, C. J., remarks, such an estate is not and cannot be created by the intention of the parties; it results by operation of law from their intention not being fulfilled.

It was argued in *Champernon's Case*, 4 Hen. VI. 19 b, 21 a, that when a tenant in tail had made a lease for life inconsistent with the fee tail, and thereby worked a discontinuance, and given himself a base fee in reversion, he held of the principal lord, and not of the donor; but the Court decided that he still held of the donor. Base fees would therefore seem not to have been affected by the Statute *Quia Emptores*.

² 1 Sand. Uses (5th ed.) 208.

³ P. 36.

terminable fee in the proper sense of the expression, if (as is perhaps the true state of the law on this subject) a determinable fee was an estate before the Statute of *Quia Emptores*, as upon a grant to A. B. and his heirs, so long as I. S. and his issue should live, in which case the donor retained, in the nature of a right to an escheat, a reversionary interest which arose on the death of I. S. and the failure of his issue. But the Statute of *Quia Emptores*, by destroying the tenure between the donor and donee, in cases where the fee was granted subsequently to the Statute, put an end to any right of reverter on such grants;" and reference is made to the passage in Anderson, above quoted.¹ Most of the careful recent writers have adopted this view.²

§ 37. The history of the only devise which in recent times has been claimed in England as raising a determinable fee is very singular. The Statute *Quia Emptores* was not referred to, but the final decision is a strong authority that determinable fees do not now exist. *Collier v. M'Bean*³ (1865) was a bill by a vendor for specific performance. Sir John Romilly, M. R., held that a devise to trustees to hold during the life of A. B., and also until the testator's debts and legacies were paid, was a determinable fee. Under this construction the plaintiff did not make a good title. The Lords Justices⁴ dismissed an appeal on the ground that, if the Master of the Rolls thought the title bad, it was too doubtful to be forced on a purchaser; but Sir J. L. Knight Bruce, L. J., stated his impression to be that the trustees took a fee simple, and that the title was good. In 1873 a case involving the same question under the same will came before the then Master of the Rolls, Sir George Jessel. *Collier v. Walters*.⁵ The Master of the Rolls doubted whether he was not bound to

¹ And see *Re Machu*, 21 Ch. D. 838, commented on in Gray, *Restraints on Alienation*, § 22, note.

² Leake, *Land Law*, 36. Marsden, *Perp.* 71, 72. Pollock, *Land Laws* (3d ed.) 226-228. Edwards,

Law of Property (4th ed.) 36. See Mr. Sweet's note to Challis, *Real Prop.* (3d ed.) 439.

³ 34 Beav. 426.

⁴ L. R. 1 Ch. 81.

⁵ L. R. 17 Eq. 252.

follow the decree in the former case; but, on the matter being mentioned at his request to the Lords Justices, they were of opinion that it was open to him to hear the case unfettered by the former decisions. The result is thus given by him:¹ "When the case comes to be argued on the footing that I was not to be bound by that decision, neither counsel asserts that that decision is right, but both positively abandon it: both the leading counsel and the junior counsel, on consideration, say that they cannot support the decision of the Master of the Rolls. That is a very strong and a very peculiar circumstance. His Lordship having determined that according to the true construction of the will there was a determinable fee, neither of the counsel for the plaintiff will argue in support of that proposition at all. In fact, there is not any authority to be found for any such determinable fee. I have looked at an enormous number of cases to see if I could find such an authority, but I have been quite as unsuccessful as the counsel for the plaintiff, and I think there is no such case to be found.² I think, therefore, I may dismiss the interpretation of the will given by Lord Romilly as untenable."³

§ 38. In Pennsylvania (if *Wallace v. Harmstad*⁴ is unsound) and in South Carolina tenure exists and the Statute *Quia Emptores* is not in force. In these States, therefore, apart from the question of remoteness,⁵ determinable fees may be valid. In *Scheetz v. Fitzwater*,⁶ *Penn. R. R. Co. v. Parke*,⁷

¹ P. 261.

² Mr. Challis, in his treatise on Real Property (3d ed.) 259, says that *Bagshaw v. Spencer*, 1 Ves. Sr. 142, 144, "seems to have escaped the diligence of Sir George Jessel, M. R.," but in that case Lord Hardwicke, C., held that a devise to trustees till debts were paid carried the legal fee; he held not that the devise carried a fee simple determinable, but that it carried "the whole fee."

³ See *Conner v. Waring*, 52 Md. 724, 734; § 40 (8) *post*; and *McDonnell v. McIsaac*, 1 Haz. & Warb. 353; Pet. P. E. I. 236.

The subject of determinable fees is more fully discussed in App. E, §§ 774 *et seq.*, *post*.

⁴ 44 Pa. 492. See § 26, *ante*.

⁵ As to this see § 312, *post*.

⁶ 5 Pa. 126.

⁷ 42 Pa. 31.

Henderson v. Hunter,¹ and *Slegel v. Lauer*,² it was assumed that fees simple determinable might be created.³

§ 39. In the other States there is either no tenure at all, or, where there is tenure, there is no good reason to doubt the existence of the Statute *Quia Emptores*. In neither case can there be any possibility of reverter. As in England, so in the United States, there are, however, several cases which speak of such interests as possible.⁴

§ 40. The cases, however, in which possibilities of reverter have come, or have been supposed to come, before American courts are few. Besides the Pennsylvania cases⁵ they are as follows:

(1) *Wood v. Cheshire*.⁶ This case states that the Superior Court in the same suit had held, at July Term, 1854, that an estate granted to a county for so long a time as the land should be used as a court-house terminated, without entry, upon the land not being so used. No such case is reported

¹ 59 Pa. 335.

² 148 Pa. 236.

³ See also *Union Canal Co. v. Young*, 1 Whart. 410, 427, 428; *Kerlin v. Campbell*, 15 Pa. 500; *First Methodist Church v. Old Columbia Co.*, 103 Pa. 608; *Courtney v. Keller*, 4 Pennyp. 38; *Gumbert's Appeal*, 110 Pa. 496; *Pa. Schuylkill Valley R. R. Co. v. Paper Mills*, 149 Pa. 18; *Scott v. Murray*, 218 Pa. 186; *Pitcairn v. Cemetery Co.*, 229 Pa. 18; *Riggs v. New Castle*, 229 Pa. 490; *Penn. Horticultural Soc. v. Craig*, 240 Pa. 137; *Speese v. Schuylkill River E. Side R. R. Co.*, 23 Pa. C. C. 17; *Foulke, Treatise*, §§ 27, 73, 74. Cf. *Stuart v. Easton*, 170 U. S. 383.

⁴ *Worster v. Gt. Falls Mfg. Co.*, 41 N. H. 16, 22. *Congregational Soc. v. Stark*, 34 Vt. 243. *Curtis v. Gardner*, 13 Met. 457, 461. *Mayor*

of New York v. Stuyvesant, 17 N. Y. 34. *Reed v. Stouffer*, 56 Md. 236, 254. *Newbold v. Glenn*, 67 Md. 489. *Hall v. Turner*, 110 N. C. 292. *Thayer v. McGee*, 20 Mich. 195, 211. *Delhi School District v. Everett*, 52 Mich. 314. *Fletcher v. Fletcher*, 88 Ind. 418. *Wiggins Ferry Co. v. Ohio & Miss. R. Co.*, 94 Ill. 83. *McDaniel v. Watson*, 4 Bush. 234. *Davis v. Memphis & Charleston R. R. Co.*, 87 Ala. 633. *Peyton, C. J. (dissenting)*, in *Kilpatrick v. Graves*, 51 Miss. 432. See *Friedman v. Steiner*, 107 Ill. 125; *Flaten v. Moorhead*, 51 Minn. 518; *Church v. Young*, 130 N. C. 8; *Rowland v. Warren*, 10 Oreg. 129; *Bolling v. Petersburg*, 8 Leigh, 224, 234; *Carney v. Kain*, 40 W. Va. 758, 812, 816.

⁵ § 38, *ante*.

⁶ 32 N. H. 421.

in the decisions of the Court for July Term, 1854, or anywhere else in the New Hampshire Reports.

(2) *Jamaica Pond Aqueduct Co. v. Chandler*.¹ In this case a fee simple determinable was said to be created, but all that was necessary for the decision was to find that a fee was created; whether determinable or absolute was, as is observed in *Chandler v. Jamaica Pond Aqueduct*,² immaterial.

(2 a) *First Universalist Society v. Boland*.³ Deed of land to a religious society to hold so long as it shall be by the society or its assigns devoted to the uses, interests, and support of certain doctrines; and when it should be diverted from said support to any other uses then the title of the society or its assigns should cease, and be vested in forty-one persons, one of whom was the grantor. A church was built on the land, and had been used for worship according to said doctrines, but the society having contracted to sell the land, the vendee refused to accept a deed on the ground that the society had not a good title, and a bill brought by the society for specific performance was dismissed. The Court said that the society had a determinable fee, and the gift over being void, there was a possibility of reverter in the grantor. This is the only case in the books in which the effect of the Statute *Quia Emptores* on determinable fees is discussed,⁴ and it therefore calls for careful consideration.

The discussion and the remarks of the Court on determinable fees seem to have been uncalled for. The bill was not, as in *Brattle Square Church v. Grant*,⁵ a bill for leave to sell land held on a charitable trust and to reinvest the proceeds; it was a bill by the vendor of land for specific performance, which must be dismissed unless the plaintiff had both the legal and the equitable title. The plaintiff held the land on a charitable trust. This trust was either a perpetual one, in which case, of course, the plaintiff, without the aid of the Court, could not

¹ 9 Allen, 159.

² 125 Mass. 544, 547.

³ 155 Mass. 171.

⁴ But see now § 40 a, *post*.

⁵ 3 Gray, 142.

make a good title, or the trust was for a limited time, in which case there would be a resulting trust for the grantor, and here again the plaintiff could not make a good title. The real question was not what was the character of the plaintiff's legal title, but whether that title was subject to a trust. There seems to have been no occasion to consider whether the legal title of the plaintiff was anything but a fee simple.

It has been ruled that property may be given to a trustee to hold on a terminable charitable trust, and that, when this trust terminates, there is a resulting trust for the grantor. There are several cases to this effect,¹ but in none of them is there any suggestion that the trustee's legal title is a determinable fee.²

The case of *First Universalist Society v. Boland* should be compared with the leading decision of *Brattle Square Church v. Grant*.³ In that case land was devised to a religious society upon the "express condition and limitation" that it should be put to a certain charitable use; "and in case the same is not improved for this use only," the testatrix declared that the devise was void, and that the land should revert to her estate, and she gave it to a nephew and his heirs. In *First Universalist Society v. Boland* land was conveyed to a religious society to hold so long as it should be devoted to certain charitable uses, and when it should be diverted to other uses, then over. In the former case it was decided that the society held the land on a charitable trust, and might be authorized to sell the land and invest the proceeds to hold on the same trusts, and that the heirs of the testatrix had no rights. In the latter case it was said that the donor had a possibility of reverter, when the land was put to other uses.

In both cases there was a holding upon a charitable trust, and in both there was a conditional limitation which was void for remoteness. There was said to be a possibility of reverter in the second case, but not in the first, and yet the only differ-

¹ They are collected, § 603 *i*,
post.

² See § 41 *a*, *post*.

³ 3 Gray, 142.

ence seems to be that in the first case the land was given to be held upon the express condition and limitation that it should be put to a certain charitable use, and in case it was not improved to this use only that it should revert, and be given to another, and in the second case land was to be held so long as it was put to a certain charitable use, and when it was diverted from that use it was to go over. It is respectfully submitted that these cases cannot be differentiated so as to make a possibility of reverter in one case, and not in the other, and that *Brattle Square Church v. Grant* is still law in Massachusetts.

If the Court in *Brattle Square Church v. Grant* had held the law to be as stated in *First Universalist Society v. Boland*, they would have had to rule that there was a possibility of reverter, and a void gift over, and that the church could not make a good title.

The only ground upon which it can be contended that there is a distinction between the two cases seems to be this: It may be said that in *First Universalist Society v. Boland* the society took a determinable fee, after which there was a possibility of reverter, and that in *Brattle Square Church v. Grant* the church took an absolute fee simple with an executory devise cutting it short. But in truth the language in *Brattle Square Church v. Grant* is more favorable to the creation of a determinable fee than that in the *Universalist Society v. Boland*. In this latter case land was given to the society to hold so long as it should be devoted to the support of certain doctrines, and, when it should be diverted from said support, the title of the society should cease and be vested in certain persons. If the words "so long as" tend to show that the estate as originally limited was to continue only so long as certain things were done, the word "cease" tends to show that what had been originally given was to be cut short. There is no express direction that the land shall revert. But in *Brattle Square Church v. Grant* there was an express direction that the land should "revert," and a separate gift over

in a separate clause. Further, the testator's nephew, to whom the gift over was made, was also the residuary devisee, and if a possibility of reverter had been allowable, he would have taken it as such residuary devisee, even though the express devise to him was bad.¹ A distinction based on such slight differences of expression might have commended itself to a court in the fifteenth or sixteenth century, but was it wise so to stick in the bark at the end of the nineteenth?²

(3) *Hooker v. Utica Turnpike Road Co.*³ Here it was merely held that a turnpike company who had abandoned their road could not recover under a penal statute for injuring it.

(4) *Leonard v. Burr.*⁴ Devise to A. of the use of land until Gloversville was incorporated into a village, and then to the trustees of said Gloversville. The Court of Appeals held that the devise over to the trustees was void, and that A. took a determinable fee. The precise point was passed upon, because if A. took a fee simple subject to a void executory devise, he would have an absolute estate, whereas it was held that on the incorporation of Gloversville the land reverted to the grantor's heirs. It is submitted that the decision was incorrect, and that in truth there was a devise to A. in fee, subject to a bad executory devise, and that therefore A. took a fee simple absolute.⁵

(5) *Gillespie v. Broas.*⁶ A deed of land for the use of a county as long as the land should be used for a court-house, and when it should cease to be so used, to revert to the grantor and his heirs, was held not to pass "a good unincumbered title." Here there seems to have been a determinable charitable trust, and a resulting trust.⁷

¹ *Re Randell*, 38 Ch. D. 213; *Blunt's Trusts*, [1904] 2 Ch. 767; *Stone v. Framingham*, 109 Mass. 303. See § 603 *i. post.*

² See § 41, *post.* The Court intimates, p. 175, that the doctrine of tenure has no significance in this country. But is this certain? May it not still have a bearing

on some questions, for instance, of escheat or of rents?

³ 12 Wend. 371.

⁴ 18 N. Y. 96.

⁵ But see *Lougheed v. Dykeman Baptist Church*, 40 N. Y. Supp. 586.

⁶ 23 Barb. 370.

⁷ See (7), *infra*.

(6) *State v. Brown*.¹ Here, as in *Jamaica Pond Aqueduct Co. v. Chandler*, *ante*, a fee simple determinable is said to have been created; but the only point at issue was whether there was a fee at all.

(6 a) Such was the case also in *Moulton v. Trafton*,² *Farnsworth v. Perry*,³ *Weed v. Woods*,⁴ and *Chapman v. Cheney*.⁵

(7) *Foy v. Baltimore*.⁶ Land was given to trustees for the use of the Roman Catholics of Baltimore, to build a chapel and lay out a burying-ground; and if the trustees did not build the chapel and use the residue as a burying-ground, then the deed to be void and the premises to revert. The land was used as a burying-ground, but the chapel was built on an adjoining parcel. On a petition to restrain the City of Baltimore from selling the land for taxes, brought by the priest of the chapel and a parishioner who had buried some of his family in the land, it was held that the petitioners had no *locus standi*, and the majority of the Court seem to place their decision on the ground that the land had reverted to the grantor.⁷ But is not the true view of the case that the trustees held the land upon a determinable charitable trust, and then when the charitable trust came to an end, there was a resulting trust to the grantor?⁸

(8) *Conner v. Waring*.⁹ Devise to A. for life, with power in A. to appoint among such one or more of the testator's children or their issue as A. might see fit. A. appointed a share to trustees in trust to permit L., a daughter of the testator, to take the rents and profits during her life, and after her death in trust that the share should become the estate of her children, and in case any one of her children should die under age without issue, its share should go to her surviving children. A. also

¹ 3 Dutch. 13. See *Hoboken Land Co. v. Hoboken*, 36 N. J. L. 540, 550.

² 64 Me. 218.

³ 83 Me. 447.

⁴ 71 N. H. 581.

⁵ 191 Ill. 574.

⁶ 4 Gill, 394.

⁷ Pp. 405, 406. See *Reed v. Stouffer*, 56 Md. 236, 254.

⁸ See §§ 41 a, 603 i, *post*.

⁹ 52 Md. 724, 734.

appointed that in case L. died without having any children or descendants of children, her share should go to the testator's surviving children and their representatives. This last appointment was held in *Torrance v. Torrance*,¹ on a like provision under the same will, to be on an indefinite failure of issue, and to be, therefore, void for remoteness. L. died without ever having had issue, and the question arose, on a bill in equity, as to the disposition of her share. The Court held that her trustees took a determinable fee, that her death terminated their estate, and that the land vested, by way of reverter, in the heirs of the testator. The Court obviously fell into the same mistake into which Lord Romilly had fallen in *Collier v. M'Bean*,² which counsel could not be found to defend, and which Sir George Jessel had so emphatically condemned in *Collier v. Walters*.³ It is clear that the trustees had a fee simple absolute, which, on the contingency that had occurred, they held subject to a resulting trust in favor of the testator's heirs.⁴

(8 a) *Second Universalist Society v. Dugan*.⁵ Land was conveyed to trustees for the use of the society of Christian people called Quakers in Baltimore to keep the same for a burying-place, and to build a meeting-house, and for no other use, intent, or purpose whatsoever. The Legislature authorized the trustees to sell the land. *Held*, that a court of equity would not force on a purchaser a title derived from the trustees, as there might be some reversionary right in the heirs of the grantor.⁶

(9) *School Committee v. Kesler*.⁷ It was held that determinable fees do not exist in North Carolina. Pearson, C. J., who delivered the opinion in this case, had previously declared

¹ 4 Md. 11.

² 34 Beav. 426.

³ L. R. 17 Eq. 252. See § 37, *ante*.

⁴ The heirs were undoubtedly entitled, but it was under a result-

ing trust and not by possibility of reverter.

⁵ 65 Md. 460.

⁶ Perhaps they were entitled under a resulting trust. See §§ 41 a, 327, 603 *i. post*.

⁷ 67 N. C. 443.

that an easement might be made determinable.¹ This was undoubtedly correct,² and was followed in *Hall v. Turner*,³ but the Court in that case, speaking of *School Committee v. Kesler*, say:⁴ "However broad may be the language quoted, we have no idea that it was the purpose of the Chief Justice to say that the limitation expressly defined by him as a base or qualified fee in *Merriman's Case* could not be made in North Carolina. Such limitations are not infrequent in this and other States (2 Wash. R. P. 4), and we are not prepared to adopt a view which leads to such a revolution in the law of limitations of real property." And this passage has since been quoted, seemingly with approval.⁵

(9 a) *Carr v. Georgia Railroad*.⁶ Land was conveyed to a railroad company by a deed containing the express stipulation that when the company ceased to use the land for a station, "this deed shall cease, determine and be void, and of no effect whatever, neither in law nor in equity, and the land, with all the rights, privileges, and appurtenances, shall revert to the donor or his heirs." It was held that the deed created a determinable fee, and that upon the railroad ceasing to use the land for a station it reverted without entry.⁷

(9 b) *Young v. Mahoning County*.⁸ Y. conveyed land to an incorporated village. Afterwards he brought an action at law against the village in the United States Circuit Court for the Northern District of Ohio to recover the land. The Court considered that a reference in the deed of the plaintiff to a statute had the effect of making the deed read as a con-

¹ *Merriman v. Russell*, 2 Jones Eq. 470.

² See § 279, *post*.

³ 110 N. C. 292.

⁴ P. 306.

⁵ *Keith v. Scales*, 124 N. C. 497, 514.

⁶ 74 Ga. 73.

⁷ In *Macon v. East Tennessee, &c. R. Co.*, 82 Ga. 501, there was a somewhat similar grant to a rail-

road. The Court thought the deed created a determinable fee, but said it was immaterial whether it created a determinable fee or a fee on condition subsequent. And see *Jackson v. Dougherty County*, 99 Ga. 185.

⁸ 51 Fed. Rep. 585; in error *sub nom.* *Mahoning County v. Young*, 59 Fed. Rep. 96.

veyance of the land for the purpose of its being used as a burying-ground. The land had ceased to be used as burying-ground. The Court held that the deed created a determinable fee, which had come to an end, and that the plaintiff was entitled to recover. But the Circuit Court of Appeals, on a writ of error, was of opinion that the village took a fee simple absolute, subject to a trust, and reversed the judgment.

(10) *Daniels v. Wilson*.¹ Land in a village was conveyed to a county by a deed, with a proviso that the land was sold for county purposes so long as the county-seat remained in the village; and if at any time the county-seat was removed therefrom, "then this conveyance to be void and of no effect, and the land reverts to the" grantors. It was held, or rather assumed without contention, that this provision was good, but whether as a condition or a limitation is not clear. The counsel for the grantor treat it as the former.²

(11) *Daniel v. Jackoway*.³ Land was conveyed to a county board for the use and benefit of the county, for a county site for a court-house. The Superior Court of Chancery of Mississippi held that when the land ceased to be used for a court-house, there was a resulting trust to the grantor, and ordered a reconveyance. The grantor was not held to have any legal interest. This was clearly correct.⁴

(11 a) *McBride v. Farmers' Gin Co.*⁵ Land was conveyed to G., his heirs and assigns to hold "as long as said premises or pools situated on said premises are used for the purpose and use of the gin and mill attached," which was on adjoining land. It was held by the Court of Civil Appeals of Texas that when the use aforesaid ceased, an assignee of the grantor was entitled to the premises conveyed.

¹ 27 Wis. 492.

² See p. 494.

³ Freem. Ch. (Miss.) 59.

⁴ See §§ 41 a, 327, 603 i, *post*. Cf. *Memphis & Charleston R. R. Co. v. Neighbors*, 51 Miss. 412, 418; *Hopkins v. Grimshaw*, 165 U. S. 342. In *Jenkins v. Jenkins*

University, 17 Wash. 160, it is not clear whether the Court thought there was a right to enter for condition broken, or a possibility of reverter or a resulting trust; whatever it was, it was held good.

⁵ 152 S. W. Rep. 1135.

§ 40 *a*. Since the second edition of this book three cases have held, following the *dictum* in *First Universalist Society v. Boland*, that a possibility of reverter exists after a terminable gift for a charity. The first is in Illinois, *North v. Graham*.¹ The Court says: "An estate of this nature has so frequently been upheld by this Court that it must be held to be recognized as the settled law in this State"; but the Illinois cases referred to by the Court were not cases of determinable fees at all, but were the ordinary cases of devises in fee simple with executory devises over.² The second case is in Maine, *Pond v. Douglass*.³ The third case, *Board of Chosen Freeholders v. Buck*,⁴ is a decision of Leaming, V. C., in New Jersey.

§ 41. The question naturally arises: Why inquire so curiously as to the validity of a common-law possibility of reverter, since by a shifting use or an executory devise to the grantor the same result can be reached? The answer is: Shifting uses and executory devices are, past a doubt, subject to the Rule against Perpetuities; but possibilities of reverter are not. It was expressly said in *First Universalist Society v. Boland* that they are not; and this seems to be the almost necessary consequence of allowing determinable fees.⁵ Therefore, if determinable fees are valid, interests can, by means of them, be created in a grantor and his heirs and assigns, which may not come into possession for centuries. It is submitted that

¹ 235 Ill. 178; and see *Dees v. Cheuvronts*, 240 Ill. 486.

² In *Morton v. Babb*, 251 Ill. 488, land was conveyed by deed to A. and his heirs, but if he died without issue, the premises to revert to the grantor and his heirs. The Court seems to have thought that a definite failure of issue was meant; and it held that A. took a determinable fee. This seems to have been done to avoid the application of the doctrine that you can-

not have a conditional limitation after a conveyance in fee by deed. But this doctrine is peculiar to Illinois, and it is not likely that the case will be followed elsewhere.

³ 106 Me. 85. Cf. the *dicta* in *Kasey v. Fidelity Trust Co.*, 131 Ky. 609, 623, and *Patterson v. Patterson*, 135 Ky. 339, cases under the Kentucky Statute. See § 737, *post*.

⁴ 79 N. J. Eq. 472.

⁵ See § 312, *post*.

theory and policy alike agree in denying the existence at the present day of possibilities of reverter.¹

§ 41 *a*. In the matter of possibilities of reverter a distinction can be taken which is possibly sound. Property may be given to trustees for temporary charitable purposes, and when those purposes have been accomplished, there is a valid resulting trust to the grantor. This doctrine, however objectionable, seems to be established.² Between allowing a resulting trust on the accomplishment of a charitable purpose, and allowing the estate of the trustee to determine of itself upon the accomplishment of that purpose, the practical distinction is small, and it may be argued that if the former be allowed, so also should be the latter. Should this argument be yielded to, possibilities of reverter might be allowed where the first estate was for a charitable purpose (and it would seem immaterial whether the estate had been acquired by sale or gift). This result if accepted would explain and justify *First Universalist Society v. Boland* and several of the other American cases mentioned above, but it could not be invoked in favor of *Leonard v. Burr* or *Carr v. Georgia Railroad*.³

§ 42. In several of the Western States, statutes have been enacted for the dedication of streets, which the courts consider as providing for the passage of the fee. In Illinois it has been held under such a statute that when the street is disused the land reverts to the grantor.⁴

¹ See the matter of determinable fees further discussed in App. E, § 774 *et seq.*, *post*; 1 Tiffany, Real Prop. § 81; and by Mr. J. M. Zane, 17 Harv. Law Rev. 297. See also § 115 *a*, *post*.

² § 603 *i*, *post*.

³ On the alleged right of the donor of land to a corporation upon the dissolution of the corporation, see §§ 44 *et seq.*, *post*.

⁴ *Gebhardt v. Reeves*, 75 Ill. 301. *Helm v. Webster*, 85 Ill. 116. *Matthiessen Zinc Co. v. La Salle*, 117

Ill. 411. The matter is fully discussed in Kales, Fut. Int. in Ill. §§ 2-13; 1 Ill. Law Rev. 312. See *Board of Education v. Edson*, 18 Ohio St. 221; *Thayer v. McGee*, 20 Mich. 195; *Patterson v. Patterson*, 135 Ky. 339; *Lithgow v. Pearson*, 25 Color. Ap. 70. *Contra*, *Pettingill v. Devin*, 35 Iowa, 344; *Day v. Schroeder*, 46 Iowa, 546. Under a common-law dedication only a right in the nature of an easement is created. The fee remains in the dedicatory, and if

§ 42 *a. Curtesy and Dower.* — The Statute *Quia Emptores* affected curtesy only indirectly by affecting the tenure of the wife. The tenant by the curtesy held of the lord of whom his wife had held. The Statute did not affect dower at all, for the tenant in dower held of the heir.

§ 43. *Rights less than Ownership in Land of others.* — Such rights are not the subjects of tenure;¹ consequently the Statute *Quia Emptores* has no application to them.

§ 44. *Escheat.* — The effect of the Statute *Quia Emptores* on the right of escheat was, of course, to give that right to the grantor's lord. It is said by Lord Coke² that "if land holden of I. S. be given to an abbot and his successors, in this case if the abbot and all the convent die, so that the body politique is dissolved, the donor shall have againe this land, and not the lord by escheat. And so if land be given in fee simple to a deane and chapter, or to a mayor and commonalty, and to their successors, and after such body politique or incorporate is dissolved, the donor shall have again the land, and not the lord by escheate." This statement has been often repeated as law, and has proved a sore stumbling-block to courts and writers in this country. Being unwilling to follow it, they have

the public use comes to an end, the fee stays as it is, the incumbrance being removed. On determinable interests under the United States mining laws, see 17 Harv. Law Rev. 301. The Supreme Court of the United States has held that such interests are incorporeal and not corporeal hereditaments, and that therefore there is no right of dower in them. *Black v. Elkhorn Mining Co.*, 163 U. S. 445. In some of the States, statutes abolishing estates tail (see § 19, note, *ante*) have been held to create what are called determinable fees. See the interesting treatment of this subject by Mr. Zane, 17 Harv. Law Rev. 305 *et seq.*

¹ 27 Hen. VIII. 10, pl. 23. Bro. Ab. Escheate, 9, 22. *A. G. v. Sands*, Hardres, 488, 496. 3 Inst. 19, 21. Co. Lit. 298 *a*, Butler's note (2). Wms. Real Prop. (22d ed.) 448. See Dean & Canons of Winsor *v.* Webb, Godb. 211. The term "tenement," though it strictly means "that which is holden," is often extended loosely so as to cover incorporeal hereditaments. Co. Lit. 6 *a*. 2 Bl. Com. 16, 17. Shep. Touch. 91. 1 Prest. Est. 8-10. Williams on Commons, 30. *Rex v. Skingle*, 1 Stra. 100. *King v. Hollington*, 3 East, 113. *Challis*, Real Prop. (3d ed.) 42, 43.

² Co. Lit. 13 *b*.

been constrained to call it "obsolete."¹ Let us examine the authorities cited by Lord Coke for his assertion. They are (a) 17 Edw. II. St. 3; (b) 9 Edw. III. 26; (c) 7 Edw. IV. 11, 12. F. N. B. 33, cited by Lord Coke, contains nothing in point.

§ 45. (a) 17 Edw. II. St. 3, *De Terris Templariorum* (1324). This Statute recites that lands of the Templars which were holden of the King and divers other lords were, upon the dissolution of the order, "seised into the Hands of our Sovereigne Lord the King, and of divers other Lords of the Fees of them, who challenged the same Lands for the Consideration aforesaid, that the same Lands ought to revert to them as their Escheats." It then enacted that the lands should be given to the order of the Hospital of St. John of Jerusalem, to hold of the King and other Lords of the Fees by the same services as the Templars held them. There is nothing here to indicate that the lords claimed as donors; on the contrary, it is expressly said that they claimed by escheat, because the lands were holden of them.

§ 46. (b) 9 Edw. III. 25, 26 (1335). This is the case of *The King v. The Prior of the Hospital of St. John*. The advowson of the church of Sanford was in the Master of the Temple, and after the lands and tenements of the Templars had been seised into the hands of the King and the other lords, the church became void. The question was whether the King had the right to present on this vacancy, or whether it had passed to the Prior of the Hospital by the grant in the above Statute of all the lands of the Templars. Shardelowe, J., said: "There is no doubt in law but that by reason of the dissolution of the order their possession was *escheat* to the King, and in the same manner to all the other Lords that which was held of them, so that the estate that the Prior had in the advowson is of the King's grant. Wherefore, after he has parted by his deed with his right of advowson, the presentation cannot remain to him." A distinct statement

¹ *Owen v. Smith*, 31 Barb. 641. *Folger v. Chase*, 18 Pick. 63, 66.

² Kent, Com. 307, note (b). See

that the lands passed by *escheat* to the lords of whom they were held. Not a word of their passing to the donors as distinct from the lords.¹

§ 47. (c) 7 Edw. IV. 10-12 (1467). *The Prior of Spalding's Case*. Trespass by the Prior for taking an estray in the Manor of Spalding. The Manor of Spalding was held by the Prior in frankalmoign of John of Gaunt as lord of the Honour of Bolingbroke. The King in Parliament granted to John of Gaunt the estrays *infra omnia feoda sua*. The Honour of Bolingbroke was forfeited by Act of Parliament to the King, and the defendant, as the King's bailiff, took an estray in the Manor of Spalding. The question at issue was whether land held of John of Gaunt in frankalmoign could be properly said to be *infra feoda sua*, within his fee. The counsel for the plaintiff contended that, as no services were rendered by tenant in frankalmoign, the land could not be said to be within the lord's fee. The judges were of a contrary opinion. It should be remembered that land in frankalmoign can be held only of the donor, and therefore, after the Statute *Quia Emptores*, estates in frankalmoign could be created only by the King.² So in frankalmoign lands the donor and the lord must be the same. Thus Fairfax, *arguendo* in this case: "If all the monks and the abbot or prior of such a house die, the donor shall have the land by way of escheat, so he is lord, and the land within his fee." Therefore in a case of frankalmoign the words "donor" and "lord" are interchangeable. The only thing in this case that makes for Lord Coke's proposition is a remark of Choke, J.: "As to what has been said, that if the abbot and all his monks die the donor can enter, it seems to me that he well may: for if the gift was to the abbot and his successors, then when the succession fails, the gift is determined, for the gift depends wholly on the succession. As if

¹ See Littleton, *arguendo*, in *Bishop of Winchester v. Prior of St. John of Jerusalem*, 35 Hen. VI. 56, 57.

² Lit. §§ 140, 141. F. N. B. 210 *et seq.*

I give land to a man to have to him and his heirs in fee so long as John A'Down has issue of his body, in that case the feoffee will hold of his lord, etc., yet if John A'Down dies without heir of his body, etc., in that case I may well enter; etc. But not by escheat, etc., but because the feoffment is determined, etc.; so here when the succession fails, the gift is determined, etc., and therefore the donor may well enter, etc." Danby, C. J.: "It seems to me that this cannot be, for notwithstanding they die, yet others can be made, etc." This *dictum* of Mr. Justice Choke certainly supports the statement of Lord Coke. It must be borne in mind, however, that it was made in a discussion on frankalmoign tenure, where the donor and the lord must be the same person, and that the statement of Choke, J., that if land is to be held so long as John A'Down has heirs of his body, there is a possibility of reverter, which is the basis of Choke, J.'s proposition, is probably not law.¹

§ 48. In early times conveyances to corporations were generally gifts to ecclesiastical corporations, and gifts to ecclesiastical corporations were usually in frankalmoign.² Upon the dissolution of a corporation, land held by it in frankalmoign escheated to the donor, for the donor was the lord. Hence, one may suspect, arose the notion that on the dissolution of any corporation all its land came back to the donor, the fact being that what made this true in case of land held in frankalmoign did not apply to land held on other tenures by corporations. At any rate, the *dictum* of Choke, J., *supra*, is the only one of the authorities cited by Lord Coke which supports his statement.

§ 49. Before the publication of Lord Coke's First Institute, 1628, he and two of his fellows of the Common Bench had said in *Dean and Canons of Winsor v. Webb*³ (1613): "That if a man give lands unto Dean and Canons, and to their successors,

¹ See §§ 31-41, *ante*; App. E, §§ 774 *et seq.*, *post.* Cf. 11 Edw. IV. 4, pl. 7; 12 Edw. IV. 3 *a*, 4 *a*, pl. 7.

² Third Report of Commissioners on the Law of Real Property

7. "Stipulations for definite spiritual services were very rare when compared with gifts in frankalmoign." 1 P. & M. (2d ed.) Hist. Eng. Law, 241.

³ Godb. 211.

and they be dissolved; or unto any other corporations; that the donor shall have back the lands again, for the same is a condition in law annexed to the gift; and in such case no writ of escheat lieth, yet the land is in him in the nature of an escheat." The remark does not seem to have been called for by the decision of the case, which was a prohibition to an Ecclesiastical Court to entertain a suit by a parson to recover the treble value of tithes. Moore, 282, 283, pl. 435,¹ is merely an opinion of Serjeants Moore and Brograve (1590) that the suppression of a monastery gave a right of entry to the founders, and that the King should be understood founder if no other was found. It was not known of whom or on what tenure the land was held. The King would clearly have been entitled by escheat.²

§ 50. But the notions which Lord Coke imposed upon his brethren did not always long survive his retirement. In *Johnson v. Norway*³ (1622) arose the precise question whether, on the dissolution of a corporation, its land went to the donor or escheated to the lord. Hobart, C. J., said: "The great doubt of the case will be upon the barre of the defendant, whether by the death of the abbot and the monks, the land escheat to the lords of whom that was holden, or whether that shall go to the donors, and to the founders, and he thought that the land shall escheat, to which Winch seemed to agree." The report adds that the judges said they would advise of the case, and gave order to argue it again; but Lord Hale's MSS.⁴ say that it was held that the land escheated. This is the only English case in which the question has been decided.

§ 51. But although Lord Coke's doctrine rests solely on a *dictum* of a judge in the fifteenth century, and is contrary to the only English case, it has often been referred to as law.⁵

¹ Cited in Harg. note to Co. Lit. 13 b.

² See Southwell v. Wade, 1 Roll. Ab. 816, A, pl. 1.

³ Winch, 37.

⁴ Cited Co. Lit. 13 b, Harg. note.

⁵ Per Lord Hardwicke in *A. G. v. Gower*, 9 Mod. 224, 226. Per Lord Mansfield in *Burgess v. Wheate*, 1 W. Bl. 123, 165. Per

But only one decision, however, has ever followed it, and it is probably among those *decantata* which when carefully examined will be found not only "obsolete and odious," but in fact to have never been law at all.¹ The alleged right of the donor is sometimes spoken of as a possibility of reverter, but this it cannot be, for if it were, a corporation could never make a good title to its land.² If the right exists at all, it must be a right in the nature of escheat. The case of *Hastings Corporation v. Letton*³ calls for notice in this connection. It was a suit by a lessor against a surety for the rent. The lessee was a corporation. The corporation (and also a corporation to which the lease had been assigned) had been dissolved. The question was whether the lease had determined; if it had, then the liability of the surety was at end; if it had not, the lease had passed to the Crown as *bona vacantia*, and the surety was still held.

Lord Denman in *Mayor of Colchester v. Brooke*, 7 Q. B. 339, 384. *Folger v. Chase*, 18 Pick. 63, 66. *Bingham v. Weiderwax*, 1 Comst. 509. *Nicoll v. N. Y. & Erie R. R. Co.*, 12 Barb. 460, 465; 12 N. Y. 121, 129, 130. *Robie v. Sedgwick*, 35 Barb. 319, 329. *Commercial Bank v. Lockwood*, 2 Harring. 8, 13. *Fox v. Horah*, 1 Ired. Eq. 358, 361. *State v. Rives*, 5 Ired. 297, 309. *Life Assoc. v. Fassett*, 102 Ill. 315. *Coulter v. Robertson*, 24 Miss. 278, 321. See *Bacon v. Robertson*, 18 How. 480, 483, 487; *Mormon Church v. U. S.*, 136 U. S. 1, 47; *Owen v. Smith*, 31 Barb. 641; *People v. Mauran*, 5 Denio, 389, 401; *Woodworth v. Payne*, 5 Hun, 551, 553; 74 N. Y. 196, 201; *A. G. v. Clergy Society*, 10 Rich. Eq. 604, 610; *St. Philip's Church v. Zion Church*, 23 So. Car. 297, 298-303, 314; *Moultrie v. Smiley*, 16 Ga. 289, 298, 299; *Davis v. Memphis & Charleston R. R. Co.*, 87 Ala. 633,

637; *State Bank v. State*, 1 Blackf. 267, 282; *McRoberts v. Moudy*, 19 Mo. Ap. 26; *Murray v. Green*, 64 Cal. 363, 367. But cf. *Gibson v. Armstrong*, 7 B. Mon. 481, 489, 490; *People v. College of California*, 38 Cal. 166; 1 Bl. Com. 484; 2 Prest. Est. 50; 1 Prest. Abs. 272; *Shep. Touch.* (Prest. ed.), p. 30; 2 Kent, Com. 307; *Challis, Real Prop.* (3d ed.) 35.

¹ The result reached in the text has been approved by Mr. Sweet in his note to *Challis, Real Prop.* (3d ed.) 467. See also *Richards v. Coal Co.*, 221 Mo. 149, 171; and cf. *McAlhany v. Murray*, 89 So. Car. 440. But cf. the remarks of Professor Williston, 2 Harv. Law Rev. 163, 164; and 10 Mich. Law Rev. 121.

² See Mr. Sweet's note, *loc. cit.*, where he comments on Preston's remarks.

³ [1908] 1 K. B. 378.

If the lease had determined, as the Court held it had, there was no question of where the title to the land should go, the title continued in the lessor who had been always seised in fee. The doctrine of Lord Coke was referred to by the Court with approval. But in truth it had no bearing on the question involved. If a fee simple is granted to a corporation, and the corporation is dissolved, the estate in fee of the corporation is at end. And the question arising is who has the right of escheat or in the nature of escheat, a question which did not and could not arise in *Hastings Corporation v. Letton*.

§ 51 *a*. The only case which has been decided in accordance with Lord Coke's remark is *Mott v. Danville Seminary*.¹ Melissa B. Lamon gave a parcel of land to the Board of Trustees of the Danville Seminary, a body incorporated under a general statute. The gift was "for the building and maintaining on said grounds an institution of learning, as provided by said law authorizing said incorporation." The corporation was dissolved by decree. The Supreme Court of Illinois held that the title thereupon vested in the donor without entry. This case, as a decision, as yet stands alone.²

4. *Statutes of Uses and of Wills.*

§ 52. The next change in the law of future estates was worked by the Statute of Uses, 27 Hen. VIII. c. 10 (1535). This Statute enacted that when anyone was seised to the use of another, such other should be seised of the same estate of which he had the use. Uses in equity could be created by parol without livery of seisin, and there was no restraint on their creation *in futuro*. When, therefore, by means of the Statute of Uses, the legal estate was united to the use, it became possible to create freeholds without livery of seisin, and commencing *in futuro*.

¹ 129 Ill. 403; 136 Ill. 289.

Jenkins University, 17 Wash. 160;

² See *Presbyterian Church v. Venable*, 159 Ill. 215; *Miller v. Riddle*, 227 Ill. 53; *Jenkins v.*

2 Ill. Law Rev. 196; *Kales, Fut. Int. in Ill.* § 126.

§ 53. Uses could be devised in equity, but when the legal estates were joined to them, they ceased to be devisable until St. 32 Hen. VIII. c. 1 (1540), which permitted devises of land. As devises were good without livery, so they too could be made to take effect *in futuro*.

§ 54. When a use or devise takes effect on the determination of preceding estates created at the same time, it is a remainder limited by way of use or devise.

When a use cuts short another granted estate, it is called a shifting use.

When it cuts short the estate of the person creating it, it is called a springing use.

Devises are not distinguished into springing and shifting. All future devises which are not remainders are called executory devises.

Conditional limitation is a common term for a shifting use and a shifting executory devise.¹

§ 55. Apart from the Rule against Perpetuities, there are no restraints on the creation of shifting and springing uses and executory devises *in futuro*. Only three exceptions to this have ever been suggested: (1) that a future freehold cannot be raised by a bargain and sale; (2) that a contingent use is bad if preceded by an estate for years; (3) that a bargain and sale cannot be to a person not *in esse*. The validity of these three supposed exceptions will now be examined.

§ 56. (1) *Can a Future Freehold be raised by a Bargain and Sale?* — There is no doubt that a feoffment may be made to a future use, or that a man may covenant to stand seised to a future use; and it would seem equally clear on principle that a man may by bargain and sale create an estate to begin *in futuro*. In a bargain and sale, as in a covenant to stand seised, the owner of the land stands seised to his own use until the time named in the bargain or covenant, and then the use shifts; the use in both cases arises out of the seisin

¹ For another meaning of conditional limitation, see Gray, *Restraints on Alienation* (2d ed.), § 22, note.

of the owner; there is no difference in the two except in the character of the consideration.

§ 57. In Massachusetts it was early held, by a singular error, that while a future estate could be raised by a covenant to stand seised, it could not be raised by a bargain and sale. "The conveyance, being in effect a bargain and sale, must have all the other requisites and qualities of a bargain and sale. One of these qualities is, that it must be to the use of the bargainee, and that another use cannot be limited on that use; from which it follows, that a freehold to commence *in futuro* cannot be conveyed in this mode; as that would be to make the bargainee hold to the use of another, until the future freehold should vest."¹ The fallacy is obvious; it lies in assuming that the use to the bargainee arises immediately upon the bargain and sale; that, under the Statute, the legal estate vests immediately in him; and that the interest of the bargainor, until the future event happens, must arise out of that legal estate of the bargainee. Whereas, in fact, the use does not arise until the future event, and in the meantime the bargainor retains his original estate. It is surprising that the learned Court did not perceive that the objection which it made to a bargain and sale applied equally to a covenant to stand seised. The Massachusetts doctrine has not been adopted elsewhere, and the error on which it rests has been often pointed out.² Even in Massachusetts the practical inconvenience of the doctrine is done away with by the other erroneous doctrine, peculiar to that State, that a covenant to stand seised can be

¹ *Welsh v. Foster*, 12 Mass. 93, 96. The same law is laid down in *Wallis v. Wallis*, 4 Mass. 135; *Pray v. Pierce*, 7 Mass. 381; *Parker v. Nichols*, 7 Pick. 111; *Hunt v. Hunt*, 14 Pick. 374, 380, 381; *Gale v. Coburn*, 18 Pick. 397; *Brewer v. Hardy*, 22 Pick. 376.

² *Jackson v. Dunsbagh*, 1 Johns. Cas. 92. *Rogers v. Eagle Fire Co.*, 9 Wend. 611. *Bell v. Scammon*, 15

N. H. 381. *Wyman v. Brown*, 50 Me. 139 (overruling the *dictum* in *Marden v. Chase*, 32 Me. 329). *Jordan v. Stevens*, 51 Me. 78. *Drown v. Smith*, 52 Me. 141. *Savage v. Lee*, 90 N. C. 320. *Bunch v. Nicks*, 50 Ark. 367. *Chandler v. Chandler*, 55 Cal. 267. See *Parsons v. Mills*, 2 Roll. Ab. 786; *Gilbert, Uses* (Sugd. ed.) 163; 4 Mich. Law Rev. 113; *Leake, Land Law*, 112, 113.

supported by a pecuniary consideration.¹ One error neutralizes the other. *A use in futuro can be raised by a bargain and sale.*

§ 58. (2) *Is a Contingent Use good although preceded by an Estate for Years?* — In *Adams v. Savage*² (1703) it was said, and in *Rawley v. Holland*³ (1712) it was held, that a use limited after an estate for years to a person not *in esse* was bad as a contingent remainder unsupported by a freehold.⁴

§ 59. The soundness of these two cases is very questionable. It is well settled that if a future limitation can be construed as a remainder it must be so construed, and not as a springing use; but it is a very different thing to say that a good springing use must be construed into a bad remainder, because it is preceded by an estate which is insufficient to support a remainder. To construe a limitation as a remainder, if it can be a remainder, is one thing; but to insist upon construing it as a remainder, when it cannot be a remainder, seems the very wantonness of destruction. In fact, an estate after an estate for years, though commonly called a remainder, is not strictly so: a remainder is an estate after a freehold; a remainder-man, so called, after an estate for years, has the present seisin, and the reason why at common law an estate cannot be given to a person not *in esse* after an estate for years is, that there is no one to take the present seisin, and that a freehold cannot be granted *in futuro*.⁵ But, by way of use, a freehold can be granted *in futuro*.

§ 60. The cases of *Adams v. Savage* and *Rawley v. Holland* have, accordingly, been much criticised.⁶ But, further, they

¹ *Trafton v. Hawes*, 102 Mass. 533.

² 2 Ld. Raym. 854; 2 Salk. 679.

³ 22 Vin. Ab. 189; 2 Eq. Cas. Ab. 753.

⁴ See *Earl of Bedford's Case*, Moore, 718; Pop. 3; *Chudleigh's Case*, 1 Co. 135 a; *Penhay v. Hurrell*, 2 Vern. 370; *Freem. Ch.* 213, 231, 235, 258; *Jackson v. Jackson*,

Fitzgib. 146; *Hayes, Limit.* 72; *Gilbert, Uses* (Sugd. ed.) 169 *et seq.*

⁵ *Leake, Land Law*, 320. *Challis, Real Prop.* (3d ed.) 80, 99.

⁶ *Gilbert, Uses* (Sugd. ed.) 167, 168, note. *Hayes, Limit.* 67, note, 72, note. 1 *Sand. Uses* (5th ed.) 147, 148. *Wilson, Uses*, 69, 70. *Challis in 1 Law Quart. Rev.* 412 *et seq.*

must be considered as being overruled by the cases in which it has been repeatedly held that a future contingent devise after an estate for years is a good executory devise, and not a bad remainder.¹ There is no intelligible distinction in this respect between springing uses and springing executory devises, and if *Adams v. Savage* and *Rawley v. Holland* have not been formally overruled, it is in all probability because the question has not arisen under a deed, as it has under wills.² The statement may therefore be ventured that *a contingent use is good although preceded by an estate for years.*

§ 61. (3) *Is a Bargain and Sale to a Person not in esse good?* — It is clear that a use, either in possession or remainder, may be raised by bargain and sale to one man, on a consideration paid by another.³ In Gilbert on Uses⁴ it is said: "If a man bargains and sells lands to one for life, then to his first son in tail, who is not yet born, it seems this is a good contingent remainder, rising out of the estate of the bargainer; but 't is said by Judge Newdigate,⁵ that by bargain and sale only, no contingent use can be supported, it seems he means by the estate of the bargainee; but, *quære*, whether it may not, *ut ante*, but it seems a feoffment or fine is the surest way, and so to put it out of the power of the owner of the land to destroy the future uses. *Quære*, whether the consideration given by the party in uses will create a use to one not *in esse*." To this passage the editor, Mr. Sugden, has appended a note: "It seems clear that a contingent use to a person not *in esse* cannot be raised by a bargain and sale; because of course the intended *cestui que use* cannot pay a consideration, and a

¹ *Gore v. Gore*, 2 P. Wms. 28 (1722). *Haywood v. Stillingfleet*, 1 Atk. 422 (1737). *Harris v. Barnes*, 4 Burr. 2157 (1768). See Lord Mansfield in *Goodtitle v. Burtonshaw*, Fearn, C. R., App. 570, 571; Gilbert, *Uses* (Sugd. ed.) 171; 22 Law Quart. Rev. 261 *et seq.*

² Cf. Challis, *Real Prop.* (3d ed.) 172.

³ *Sharington v. Strotton*, Plowd. 298, 307. 2 Roll. Ab. 784, pl. 6, 7. 2 Inst. 672. *Buckley v. Simonds*, Winch, 59, 61. *Case of Sutton's Hospital*, 10 Co. 23, 34 *a.*

⁴ (Sugd. ed.) 398.

⁵ 2 Sid. 158.

consideration paid by the tenant for life would not, it is conceived, extend to the unborn son." In the same book ¹ Gilbert says that a man cannot in a bargain and sale reserve to himself a power of making leases, because "no uses will rise without consideration, therefore not to the lessees; for where the persons are altogether uncertain, and the terms unknown, there can be no consideration." To this the editor adds in a note: "But although a general power of leasing cannot be reserved, yet a power may be reserved in a bargain and sale to grant a lease to a person from or on behalf of whom a valuable consideration moved at the execution of the deed." ² In Sanders on Uses ³ it is said that "if there be a bargain and sale for the life of the bargainee, with a power for him to make leases, a lease made under that power cannot operate as an appointment of the use to the lessee."

§ 62. The statement of these eminent lawyers appears to have little support either in principle or authority. As a consideration paid by one person can raise a use, and even a future use, to another, there seems no reason why it should not raise a use to a person not *in esse*. If the *cestui que use* had to pay or promise the consideration, that would be a reason for requiring him to be *in esse*; but as the consideration can be paid or promised by a stranger, the reason fails. A man may covenant to stand seised to the use of relatives not *in esse*, e. g. to the use of the covenantor's unborn children.⁴ And it would seem that if a use can be raised to an unborn person by a covenant to stand seised, it can be raised to such person by a bargain and sale.

§ 63. The only authorities cited in support of the theory that a use to a person not *in esse* cannot be raised by bargain and sale seem to be 2 Sid. 158 and Pop. 81. The first cita-

¹ P. 91.

² See also Sugd. Pow. (8th ed.) 138, 139.

³ 2 Sand. Uses (5th ed.) 62.

⁴ See Bolls v. Winton, Noy, 122; Mildmay's Case, 1 Co. 175, 176 b,

177 a; Warwick v. Gerrard, 2 Vern. 7; 2 Hayes, Conv. (5th ed.) 89 *et seq.*; Sugd. Pow. (8th ed.) 138, 139. But cf. Bradford v. Griffin, 40 So. Car. 468, 471, § 398 a, *post*; 4 Kent, Com. 496.

tion is a *dictum* of Newdigate, J., in *Heyns v. Villars*,¹ a case in the Upper Bench during the Commonwealth (1659). He says, speaking of a bargain and sale, as distinguished from a covenant to stand seised and from a feoffment: "By this conveyance only no contingent use can be supported. See for this 4 Ma. Dy. f. 155 *a*, acc." This case referred to is *Tyrrel's Case*,² which established that a use cannot be raised out of the use of a bargainee, — a proposition undoubtedly correct, but giving no support to the theory that a contingent use cannot be raised out of the seisin of the bargainor. The second authority cited is *Dillon v. Fraine*.³ Popham, C. J., there says: "And I remember that when I was a counsellor at law in the time of the Lord Dyer, where a feoffment was made to the use of one for life, with remainders over, with restraint to alien, and with power given to tenant for life to make leases for one and twenty years or three lives, it was much doubted whether this power so limited to him without words in the assurance that the feoffee and his heirs shall stand seised to these uses, shall be good to make such leases or not. And therefore suppose that a man bargains and sells land to one for his life by deed indented and inrolled, and make therein a proviso, that the tenant for life may make such leases, this is to no purpose as to power to make a lease." What the Chief Justice seems to mean is this: In case of a feoffment to uses with power in A. to make leases, it is doubtful whether any use will arise to the lessees, unless it is expressly stated in the deed of feoffment that the feoffee is seised to the uses of the lessees under such leases as A. shall make; and so in a bargain and sale, with power in A. to make leases, no use will arise to the lessees, unless the bargain and sale is in terms to the lessees under such leases as A. shall make.⁴ This is a question of the merest form, on which the matter would certainly not turn at the present day. Whatever the meaning of this obscure *dictum*, it is a slight

¹ 2 Sid. 157, 158.

² Dyer, 155 *a*.

³ Pop. 70, 81.

⁴ See *Mildmay's Case*, 1 Co. 175.

foundation on which to build so inconvenient a doctrine, as that a use to a person not *in esse* cannot be raised by bargain and sale. It is entirely *obiter*, and occurs in a case better known as *Chudleigh's Case*,¹ abounding in the most futile conceits of school logic. Sugden in his *Treatise on Powers*² well says of another *dictum* of Popham in this case: "Indeed, had the whole Court delivered this opinion it would not at this day be entitled to much attention. All the settlements in the kingdom are made by way of use which is there styled impious."

§ 64. The origin of the notion that a bargain and sale cannot raise a use to a person not *in esse* seems to have been this: In a covenant to stand seised a general power to lease is bad, because the lessee may not be of the blood of the covenantor, and by covenant to stand seised no use can be raised to one who is not of kin or connected by marriage.³ Hence it was assumed that a general power to lease must be bad also in a bargain and sale. The fallacy lay in forgetting that while a consideration of blood cannot come from a stranger, a money consideration can. The true doctrine is therefore believed to be that *a bargain and sale to a person not in esse is good*.⁴

§ 65. The practical importance of this last discussion lies in the fact that when an intended conveyance has failed to take effect as a feoffment through lack of livery or a statutory substitute for livery, it may take effect, if it be for a consideration of blood, as a covenant to stand seised, or if it be,

¹ Reported, besides *ut sup.*, 1 Co. 120; Jenk. 276; 1 And. 309.

² 1 Sugd. Pow. (7th ed.) 22.

³ In a covenant to stand seised a power to lease to unborn relations is good. See § 62, *ante*.

⁴ In *Ocheltree v. McClung*, 7 W. Va. 232, 242-247, it was considered that a use to persons not *in esse* might be raised by a bargain and sale. It is not clear how far the decision rested on the special lan-

guage of the Virginia Statute. But in the first edition the case of *Smith v. Smith*, 1 Jones, 135 (1853), was overlooked. In this case it was held that upon a bargain and sale to A. an appointment under a general power given to B. was bad. The decision is rested largely upon the remarks of Sugden and Sanders cited and referred to *supra*. Cf. *Taylor v. Eatman*, 92 N. C. 601.

or be alleged to be,¹ for a valuable consideration, as a bargain and sale.² It is most undesirable to hamper the effect of this sensible and beneficent rule of law by an unnecessary theory that a use to persons not *in esse* cannot be raised by a bargain and sale. For if such theory be groundless, then every conveyance will operate according to the intention of the parties, unless in the very rare case that there is neither a consideration of blood, nor a valuable consideration, nor a recital of a valuable consideration.³

§ 66. If the three questions discussed in §§ 56–65, *ante*, have been correctly answered in the affirmative, then there is no restraint on the creation of future estates in land, either by way of use or by will, other than the Rule against Perpetuities.

5. *Later Legislation.*

§ 67. In several of the United States freehold estates may be created *in futuro* either by express provision of statute⁴ or by inference from statutes dispensing with the necessity of livery of seisin.⁵ And although in several of the States (e. g.

¹ "The recital of a consideration is conclusive for the purpose of supporting the deed against the grantor and his heirs." *Trafton v. Hawes*, 102 Mass. 533, 541. So, accordingly, *Fisher v. Smith*, Moore, 569; *Wilkes v. Leuson*, Dyer, 169 a; *Salisbury v. Clarke*, 61 Vt. 453; *Fuller v. Missroon*, 35 So. Car. 314; *Davis v. Jernigan*, 71 Ark. 494; *Kuuku v. Kawainui*, 4 Hawaii, 515; *Gilbert, Uses* (Sugd. ed.), 96. See *Jackson v. Serbring*, 16 Johns. 515; *Gault v. Hall*, 26 Me. 561. The case of *Singleton v. Bremer*, 4 McCord, 12, is perhaps *contra*.

² *Elphinstone, Interp. of Deeds*, 40 *et seq.* *Pray v. Pierce*, 7 Mass. 381. *Russell v. Coffin*, 8 Pick. 143, 151. *Hunt v. Hunt*, 14 Pick. 374, 380–382. *Havens v. Sea Shore*

Land Co., 47 N. J. Eq. 365. See, in *Thatcher v. Omans*, 3 Pick. 521; *Handy v. McKim*, 64 Md. 560; *Perry v. Price*, 1 Mo. 553; and *Lambert v. Smith*, 9 Oreg. 185, the converse case, where a deed purporting to be a bargain and sale was allowed to operate as a feoffment. See also 4 Mich. Law Rev. 111, where there is a collection of cases in which a deed expressed in one form was allowed to operate in another.

³ See *Bryan v. Bradley*, 16 Conn. 474; *Eckman v. Eckman*, 68 Pa. 460. Cf. 4 Mich. Law Rev. 121.

⁴ 1 Stimson, *Amer. Stat. Law*, § 1421.

⁵ See *Abbott v. Holway*, 72 Me. 298; *Gorham v. Daniels*, 23 Vt. 600;

New York, Michigan, and Wisconsin¹⁾ uses have never existed or have been abolished, which of itself would greatly limit the creation of estates *in futuro*, yet wherever this has been done it is believed that freehold estates can, by statute, be created *in futuro*, so that the abolition of uses occasions no practical inconvenience.²

§ 68. A possible exception to this is Ohio. The Statute of Uses is not in force in that State.³ And it has never been expressly enacted that freeholds can be created *in futuro*. But land passes there by deed without livery of seisin,⁴ and the courts of Ohio will not improbably hold, as have those of Maine and other States,⁵ that when livery of seisin is no longer necessary the objection to the creation of a freehold *in futuro* falls with it.

§ 68 *a*. In Illinois the Supreme Court has said,⁶ and later directly ruled, that a fee cannot be limited upon another fee either by deed⁷ or by will.⁸ The learned court has corrected this slip so far as executory devises are concerned,⁹ but unaccountably has failed to do so with regard to limitations by

Savage *v.* Lee, 90 N. C. 320; Rowland *v.* Rowland, 93 N. C. 214; Sabledowsky *v.* Arbuckle, 50 Minn. 475; Bunch *v.* Nicks, 50 Ark. 367; Puukaiakea *v.* Hiaa, 5 Hawaii, 484; 2 Washb. Real Prop. (5th ed.) 641-645.

¹ See 1 Greenl. Cr. 302, note; 1 Stimson, Amer. Stat. Law, § 170.

² Ferguson *v.* Mason, 60 Wis. 377. And see Kuuku *v.* Kawainui, 4 Hawaii, 515.

Whether the Statute of Enrolments, 27 Hen. VIII. c. 16, is in force in America generally, *quære*. It is in force in New Brunswick. Doe d. Hanington *v.* McFadden, Bert. 153. But not in Massachusetts. Trafton *v.* Hawes, 102 Mass. 533, 541. Nor in New York. Jack-

son *v.* Dunsbagh, 1 Johns. Cas. 91, 97. Nor in California. Chandler *v.* Chandler, 55 Cal. 267, 271.

³ Doe d. Thompson *v.* Gibson, 2 Ohio, 339. Helfenstine *v.* Garrard, 7 Ohio, pt. 1, 275. Williams *v.* First Presbyterian Soc., 1 Ohio St. 478, 497. Carroll *v.* Olmsted, 16 Ohio, 251, 260. See § 23, *ante*.

⁴ Borland *v.* Marshall, 2 Ohio St. 308, 313, 314.

⁵ See note 5 to preceding section.

⁶ McCampbell *v.* Mason, 151 Ill. 500.

⁷ Palmer *v.* Cook, 159 Ill. 300.

⁸ Ewing *v.* Barnes, 156 Ill. 61.

⁹ Glover *v.* Condell, 163 Ill. 566. Strain *v.* Sweeny, Id. 603.

deed,¹ and this, although the Statute of Uses has been in substance expressly re-enacted in Illinois.²

¹ *Kron v. Kron*, 195 Ill. 181.

² Ill. Rev. Sts. c. 30, § 3. See *Witham v. Brooner*, 63 Ill. 344; *Shackelton v. Sebree*, 86 Ill. 616; *Meacham v. Steele*, 93 Ill. 135; *Kirkland v. Cox*, 94 Ill. 400; *O'Melia v. Mullarky*, 124 Ill. 506; *Vinson v. Vinson*, 4 Ill. Ap. 138. But cf. *Stoller v. Doyle*, 257 Ill. 369.

In *Palmer v. Cook*, *ubi sup.*, Thomas S. did "grant, bargain, sell, convey, and warrant to Mary and Emily" certain real estate, "in case either of the grantees dies without a heir, her interest to revert to the survivor." It would seem tolerably clear that at common law, had words of inheritance been used in the grant, the grantees would have been held to be tenants in common in tail, with a remainder to the survivor in fee. As the grantees were presumably relations, neither could die "without a heir" so long as the other survived, and therefore "without a heir" must be construed "without heirs of the body." How this would be affected by the Illinois Statute (R. S. c. 30, §§ 6, 13) is not entirely clear. The most probable construction would be that each grantee took a life estate, with a remainder to her children, if she left any at her death, and if she left no children, then to the survivor. Cf. *Smith v. Kimbell*, 153 Ill. 368. It may be supposed that in *Palmer v. Cook* there was an adoption of the Massachusetts doctrine, § 57, *ante*, that a freehold *in futuro* cannot be created by a bargain and sale, were it not that the Illinois Court has held that an estate *in futuro* can

be created by a bargain and sale. *Shackelton v. Sebree*, 86 Ill. 616. This matter is elaborately discussed in *Kales*, *Fut. Int.* in Ill. §§ 137-156. And see *Morton v. Babb*, 251 Ill. 488, § 40 *a*, note 2, *ante*.

The Circuit Court of the United States for the Northern District of Georgia held, in *Printup v. Hill*, 107 Fed. Rep. 789, that by the law of that State, before the passage of the Code, no shifting use could be created by deed. This decision and a *dictum* in *Greer v. Pate*, 85 Ga. 552, rest upon a misconception of the case of *Cook v. Walker*, 15 Ga. 457, where it was held in accordance with the doctrine generally received in the United States that if a fee is granted with a conditional limitation over in case the grantee does not dispose of the land by deed or will, such conditional limitation is void. This doctrine, whether right or wrong, as to which see *Gray*, *Restraints on Alienation*, §§ 56 *et seq.*, furnishes no objection to the validity of shifting uses generally. Executory devises would be equally objectionable. Under the present Civil Code of Georgia (1911), § 3658, a fee can be limited on a fee either by deed or by will. *Davis v. Hollingsworth*, 113 Ga. 210. See as to a similar blunder made with regard to personal property, App. F, §§ 846, 847, *post*.

Still more remarkable is a *dictum* in *Simmons v. Cabaune*, 177 Mo. 336, that a fee cannot be limited on a fee even by will, that is, that there can be neither shifting use nor executory devise in Missouri.

6. *Equitable Estates.*

§ 69. Of future uses before the Statute of Uses, and of future trusts since, there has been no restraint on the creation, save the Rule against Perpetuities.

B. LANDS OF COPYHOLD TENURE.

§ 70. (1) In lands held in copyhold there may be reversions and remainders; and the remainders may be either vested or contingent.¹ (2) Copyholds may be surrendered on condition.² (3) In some manors an estate to A. and the heirs of his body gives a fee simple conditional at common law; in others the principle of the Statute *De Donis* has been adopted by the custom, and A. takes an estate tail.³ (4) It is not clear how far future estates other than remainders can be limited in a surrender,⁴ and to avoid the doubt, when freehold and copyhold lands are settled, although a legal estate is given in the freeholds, the copyholds are ordinarily given to trustees to hold upon trusts corresponding to the legal estates in the freeholds.⁵ (5) The Statute of Uses does not apply to copyholds.⁶ (6) When copyholds are surrendered to the use of a will, an executory devisee is entitled to admittance.⁷ The Statute *Quia Emptores* has no application to copyholds, and, therefore, a determinable fee with a possibility of reverter seems possible in a limitation of copyholds.⁸ And a pos-

¹ Wms. Real Prop. (22d ed.) 502.

A contingent remainder in copyhold land is not destroyed by the forfeiture or surrender of the particular estate; the freehold in the lord is said to support it, until the time when the particular estate would have expired; but if the contingent event does not happen before the expiration of such time the remainder fails. Fearn, C. R. 319, 320. Scriv. Cop. (7th ed.) 65, 66. Wms. Real Prop. (22d ed.) 503.

² Scriv. Cop. (7th ed.) 107, 108.

³ Wms. Real Prop. (22d ed.) 478-481. Challis, Real Prop. (3d ed.) 27, 300.

⁴ See 1 Scriv. Cop. (4th ed.) 159-188.

⁵ 3 Dav. Prec. Conv. (3d ed.) 597.

⁶ Wms. Real Prop. (22d ed.) 498.

⁷ Glass v. Richardson, 2 De G. M. & G. 658.

⁸ See Doe d. Blomfield v. Eyre, 3 C. B. 557; 5 C. B. 713; § 783, *post*.

sibility of reverter is certainly allowed after a fee simple conditional.¹

II. PERSONAL PROPERTY.

A. CHATTELS REAL.

§ 71. As there is no seisin of a chattel real, an estate for years can be granted to begin *in futuro*, the grantee in the meantime having an *interesse termini*.² Thus an estate can be granted to A. for five years, then to B. for five years, and then to C. for five years, the grants to B. and C., etc., being, not remainders, but grants to commence *in futuro*, independent of the preceding grant or grants.³ An underlease or assignment of a term may be created to take effect *in futuro*.

§ 71 *a*. A grant to A. for life of an existing term for years gives him the whole term. This is for the technical reason that an estate for life is greater than any estate for years, that, therefore, when an estate for life in a term for years is granted, the whole term passes; and that no more passes, is only because there is no more to grant.⁴ But a grant of a leasehold by the termor to hold after the death of a stranger who takes no interest in the land, is good, for though there is a presumption of law that a life estate cannot be less than a term for years, there is no presumption that a particular man will not die within the term.⁵

§ 71 *b*. In England the doctrine that a grant for life of a term for years passes the entire term has been maintained to the present day; and for this reason in making settlements in England leaseholds are always put in trust.⁶ In America,

¹ Doe d. Simpson v. Simpson, 4 Bing. N. C. 333; 5 Scott, 770; Doe d. Blesard v. Simpson (in Cam. Scacc.), 3 Man. & G. 929; Pemberton v. Barnes, [1899] 1 Ch. 544. See § 14, *ante*.

² See Barwick's Case, 5 Co. 93 *b*, 94 *b*; Weld v. Traip, 14 Gray, 330.

³ See Wright v. Cartwright, 1 Burr. 282.

⁴ See App. F, §§ 807 *et seq.*, *post*.

⁵ See App. F, §§ 810, 811, *post*.

⁶ See App. F, § 812, *post*; Wms. Settlements, 223, 224.

however, it is probable that chattels real will be dealt with like chattels personal, and interests for life in them allowed to be created by deed as well as by will.¹

§ 72. A condition may be attached to a lease, on breach of which the lease may be terminated without entry;² and the entire leasehold estate may be assigned on a condition of which the assignor may take advantage.³

§ 73. The Statute of Uses does not apply to leaseholds, and therefore there can be no future use raised out of a term for years.⁴

§ 74. The validity of executory bequests of leaseholds, though once doubtful,⁵ was established by *Manning's Case*⁶ and *Lampet's Case*;⁷ for although a generation of judges grumbled at these decisions, they have never been overruled, and the law is now perfectly settled.⁸ Thus, by will, a leasehold may be made to shift upon the death of the person to whom it is first given, or upon any contingent event.⁹

§ 75. There is no restraint on the creation of equitable interests in terms for years. Thus leaseholds may be given to trustees, in trust for A. for life, and then in trust for B.

§ 76. As is the case with all chattels, if an interest, legal or equitable, in a term for years, be given to A. and his heirs or to A. and the heirs of his body, A. takes the entire interest¹⁰ which on his death goes to his executors.

¹ See App. F, §§ 816, 856, *post*. In Maryland it has been held that a life interest can be created by deed in a leasehold estate renewable forever, and the Court expressed a strong opinion that a life interest could be created by deed in any leasehold estate. *Culbreth v. Smith*, 69 Md. 450. Cf. *Arthur v. Cole*, 56 Md. 100.

² See § 12, note, *ante*.

³ *Doe d. Freeman v. Bateman*, 2 B. & Ald. 168.

⁴ *Leake, Land Law*, 118. Of course a term can be raised by the

Statute of Uses out of a freehold estate.

⁵ See §§ 148-151, *post*.

⁶ 8 Co. 94 b.

⁷ 10 Co. 46 b.

⁸ See 2 Swanst. 464, 465.

⁹ For the theory upon which the courts went in reaching this result, see App. F, § 815, *post*. For the case of a devise of a term to A. for life without any gift over, see App. F, §§ 819, 820, *post*.

¹⁰ *Brouncker v. Bagot*, 1 Mer. 271.

B. CHATTELS PERSONAL.

§ 77. *English Law.* — The English law will first be stated, and then the American law. Taking the English law, the first thing to be noted is that as, according to the prevailing opinion, a parol gift of a chattel is not good without delivery, there can be no gift of a chattel by parol to begin *in futuro*.¹ But if the conveyance is by deed or for value, it can be made to take effect at any time, present or future.

§ 78. Chattels personal may be bailed for a term of years, but it is believed that a grant for life passes the entire interest, and that any gift over is void at law.² Therefore, in settling property, chattels personal, like leaseholds, are settled in trust, the equitable interest shifting on the death of a *cestui que trust* or other future event. Chattels personal may be granted on condition, and upon breach the grantor can revest the property in himself without a redelivery.³

¹ The leading authorities for the common view are: Bract. 16 *a*; Jenk. 109; Irons *v.* Smallpiece, 2 B. & Ald. 551; Shower *v.* Pilck, 4 Ex. 478; Noble *v.* Smith, 2 Johns. 52. The case in which this view was first clearly announced was Irons *v.* Smallpiece, *ubi sup.* That decision was hardly in accordance with the weight of the authorities at the time. See 2 Edw. IV. 25; Perk. §§ 57, 59; Wortes *v.* Clifton, 1 Roll. R. 61; Hudson *v.* Hudson, Latch, 214; Ward *v.* Turner, 2 Ves. Sr. 431, 442. And its soundness has been seriously questioned. Wilbraham *v.* Snow, 2 Wms. Saund. 47 *a*. London & Brighton R. Co. *v.* Fairclough, 2 M. & G. 674, 691, note. Lunn *v.* Thornton, 1 C. B. 379, 381, note. Ward *v.* Audland, 16 M. & W. 862, 870. Flory *v.* Denny, 7 Exch. 581, 583. Oulds *v.* Harrison, 10 Exch. 572, 575. Winter *v.* Winter, 4 L. T. R. 639;

9 W. R. 747. Martin *v.* Reid, 31 L. J. C. P. 126, 127. Douglas *v.* Douglas, 226 L. T. R. 127. *Re* Ridgway, 15 Q. B. D. 447. Poulain *v.* Poullain, 79 Ga. 11. But though in *Re* Harcourt, 31 W. R. 578, Pollock, B., refused to follow Irons *v.* Smallpiece, the Court of Appeal, in *Cochrane v. Moore*, 25 Q. B. D. 57, in an elaborate opinion, reaffirmed the doctrine of Irons *v.* Smallpiece. See 6 Law Quart. Rev. 446. And the common notion is now so prevalent that it is not likely that it will be departed from. See § 96, *post*.

² Wms. Pers. Prop. (17th ed.) 393. This is the prevailing view in the English text-books. But there appears to be no judicial decision in support of it, and see 2 Bl. Com. 398, and App. F, § 829, *post*.

³ See § 72, *ante*.

§ 79. The Statute of Uses does not apply to chattels personal any more than to chattels real.

§ 80. It has been settled since *Manning's* and *Lampet's Cases*¹ that an executory bequest of leaseholds is good at law, but it has been said that "it may be doubted whether the doctrine of executory bequests is applicable in law to any other chattels than chattels real."² The authorities are as follows: In the Year Book of 37 Hen. VI. 30 (1459), a testator made A. and B. his executors, and bequeathed a graile or mass-book to B. to have and use for the term of his life, and after his death the remainder to A. in the same manner for the term of his life, and after his death the remainder to the parishioners of a church forever. Prisot, Chief Justice of the Common Pleas, said that the property was in the executors "and not in the devisees, for they will have only the occupation and '*manurance*' for the term of their two lives, and so no property in them." Bro. Ab. Devise, 13, under this case says: "In the time of Hen. VIII. and Edw. VI. it is agreed to be good law that the occupation can so remain, but if the thing itself was devised to the use the remainder is void, for a gift or devise of a chattel for an hour is forever, and the donee or devisee can give, sell, and dispose of it, and the remainder dependent on it is void, which note, for it is '*valde bone diversitie*.'"³ In Owen, 33, under the heading of Trinity Term, 7 Eliz. (1565), is this: "Note by Dyer [C. J. of the C. P.] that the Lord Fitz-James, late Lord Chief Justice of England, did devise his land to Nicholas Fitz-James in tail, with divers remainders over, and in the same devise he devised divers jewels and peeces of plate, viz. the use of them to the said Nicholas Fitz-James, and the heires males of his body. In this case it was the opinion of the Court that the said Nicholas had no property in the said plate, but onely the use

¹ 8 Co. 94 b; 10 Co. 46 b; § 74, ante.

² Wms. Pers. Prop. (17th ed.) 395.

³ See *Welcden v. Elkington*,

Dyer, 358 b, 359 a; Plowd. 519, 521, 522; *Paramour v. Yardley*, Plowd. 539, 542; Bro. New Cas. § 334; Anon., Dyer, 7 a.

and occupation. And the same law where the devise was that his wife should inhabit in one of his houses which he had for terme of years during her life, because the wife takes no interest in the terme, but onely an occupation and usage, out of which the executors cannot eject her during her life; but Walsh held the contrary.”

§ 81. From these meagre indications it would appear that originally no legal right of property could be created by will in a chattel, either real or personal, other than an absolute interest, but that the use or occupation of a chattel might be given to A. for life, and that although A. thereby acquired no property, he yet gained a right of occupation.¹

§ 82. In *Mallet v. Sackford*² (1607) a term was devised to A. for life, and on A.'s death over. The Court were divided in opinion whether the gift over was void; and in this case apparently, according to 1 Roll. Ab. 610, the Court said: “If a man devise a chattel personal to one for life, the remainder to another, it is a void remainder.” But two years later, in *Manning's Case*,³ it was held that upon a devise of a term to A. for life, and on A.'s death to B., B. took a legal estate by executory devise; and that it was immaterial whether the gift was of the term or of the use of the term. This was confirmed in *Lampet's Case*.⁴ From the way these decisions were received it is clear that the doctrine was an innovation. Was the innovation to be extended to chattels personal?

/ § 83. It had been pointed out by counsel, and agreed to by the Court of King's Bench in *Paramour v. Yardley*,⁵ that there might be an occupation of a chattel personal distinct from the property, but that the devise of the occupation of a term was the same as a devise of the land itself. Accordingly it would not be strange to find preserved, as to chattels personal, the distinction between a bequest of the use of a chattel and a bequest of the chattel itself, which distinction had disappeared

¹ See *Paramour v. Yardley*, Plowd. 539, 542.

² Cro. Jac. 198.

³ 8 Co. 94 b.

⁴ 10 Co. 46 b; § 74, *ante*.

⁵ Plowd. 539, 542.

as to chattels real. Such is in fact the case. In the Court of Common Pleas, *Anon.*¹ (1641), "A prohibition was prayed unto the Council of the Marches of Wales, and the case was thus: A man being possessed of certain goods devised them by his will unto his wife for her life, and after her decease to J. S., and died. J. S. in the life of the wife did commence suit in the Court of Equity, there to secure his interest in remainder, and thereupon this prohibition was prayed. And the justices, viz. Banks, Chief Justice, Crawley, Foster (Reeve being absent), upon consideration of the point before them, did grant a prohibition, and the reason was because the devise in the remainder of goods was void, and therefore no remedy in equity, for *Æquitas sequitur legem*. And the Chief Justice took the difference, as in 37 H. 6, 30, Br. Devise 13, and Com. *Welkden & Elkington's Case*, betwixt the devise of the use and occupation of goods, and the devise of goods themselves. For where the goods themselves are devised, there can be no remainder over; otherwise, where the use or occupation only is devised. It is true that heirlooms shall descend, but that is by custom and continuance of them, and also it is true that the devise of the use and occupation of land is a devise of the land itself, but not so in case of goods, for one may have the occupation of the goods, and another the interest, and so it is where a man pawns goods and the like. For which cause the Court all agreed that a prohibition should be awarded." There are three things shown from this case as to the then understanding of the law: (1) That a devise of chattels, after a devise of them for life, was bad; while a devise of them subject to a devise of the use of them was good. (2) That the same rule prevailed in equity as in law. (3) That the interest which the devisee of the use of a chattel had, though not a right of property, was a legal right of possession like that of a pawnee.

§ 84. But, in a series of decisions in the last half of the seventeenth century, it was held that, in equity, if a chattel personal be bequeathed to A. for life, and on A.'s death to B.,

¹ March, 106.

the bequest of the chattel to A. will be considered as a bequest of the use to him; that the property will be considered to belong to B.; and that A. will have only the use.¹ In *Vachel v. Vachel* and *Catchmay v. Nicholas* the opinions of common-law judges were sought, and were in accordance with the judgments delivered, so we may assume that the common law was considered to agree with equity on this point.

§ 85. It may safely be considered as settled at the present day that on a bequest of a personal chattel to A. for life, and on A.'s death to B., A.'s right to enjoy it during his life, and B.'s right to have it on A.'s death, will both be somehow protected; but the manner of doing so is not entirely clear. There seems to be three modes in which it may be done. *First*, A. may be considered as having a right to possession at law, and the immediate vested right of property as being in B. This appears to be the theory of the cases cited in the preceding sections. *Second*, A. may be considered as having the legal right of property, which on his death shifts to B. This appears to have been Lord Thurlow's opinion,² and it is the opinion of the modern English text-writers.³ For most questions⁴ it is immaterial which of these two theories is adopted. On either hypothesis, both A. and B. have legal rights, and are entitled to legal remedies.

§ 86. *Third*. The whole interest may pass to A. at law, who will hold the chattel in trust for himself for life, and on his death for B. This was possibly Mr. Fearne's view;⁵ but

¹ *Vachel v. Vachel*, 1 Ch. Cas. 129 (1669). *Catchmay v. Nicholas*, Cas. temp. Finch, 116 (1673). *Smith v. Clever*, 2 Vern. 38, 59 (1688). *Shirley v. Ferrers*, 1 P. Wms. 6, note (1690). *Clarges v. Albemarle*, 2 Vern. 245 (1691). *Anon.*, Freem. Ch. 206 (1695). *Hyde v. Parrat*, 1 P. Wms. 1; 2 Vern. 331 (1695). *Tissen v. Tissen*, 1 P. Wms. (1718) 500. See *Boucher v. Antram*, 2 Ch. Rep. 65; Pollexf.

37; *Upwell v. Halsey*, 1 P. Wms. 651; *Randall v. Russell*, 3 Mer. 190, 195.

² See *Foley v. Burnell*, 1 Bro. C. C. 274, 278.

³ See App. F, § 831, *post*.

⁴ But not for all, see § 86 *a*, *post*.

⁵ *Fearne*, C. R. 401, 414. See *Anon.*, Freem. Ch. 137; and cf. *Sabbarton v. Sabbarton*, Andrews, 333, 335; Cas. temp. Talb. 55, 245; *Doo v. Brabant*, 4 T. R. 706, 710.

the case of *Hoare v. Parker*¹ is perhaps inconsistent with such a theory, for there the person interested in chattels, after the death of the one who had enjoyed them during her life, brought trover for them, to maintain which he must have had a legal right to possession. The case is, however, so imperfectly reported, that it furnishes a dangerous ground for argument. The weight of authority certainly preponderates in favor of one of the two former views. The question is important, for if the last view be sound, the owner for life, having the whole legal estate, may transfer the chattel to a purchaser for value without notice, who will hold it free from the claim of one interested in remainder, for, under the last view, this claim is *ex hypothesi* equitable only.

§ 86 *a*. Although, as has been said,² it is immaterial in most cases which of the first two theories is adopted; yet there are two classes of questions (as will be shown hereafter) in which the adoption of the one or the other theory is vital, questions of remoteness, and questions on reversionary interests where there is a life interest given without any gift over.³ The first theory is that of the older decisions, indeed it may be said (with one exception)⁴ of all the decisions. The second is that of the modern English text-books. The former theory is believed to be correct. There is no reason why the use of a chattel personal belonging to B. should not be given to A. for life, the property remaining vested in B. The modern theory arose, apparently, from a mistaken analogy to chattels real. There is a legal presumption that a life estate is larger than any term for years, but there is no legal presumption that an interest for life in a picture will last longer than the picture itself, and therefore there is no technical objection to regarding the right to a chattel of which the use has been given to another for life, as vested in the owner. In other words, if a chattel is

¹ 2 T. R. 376.

² § 85, *ante*.

³ See App. F, §§ 838–842, *post*.

⁴ *In re Tritton*, 81 L. T. R. 301;

6 Morell, 250; stated App. F, § 833, *post*. See *In re Thynne*, [1911] 1 Ch. 282.

bequeathed to A. for life and then to B., B. ought to be regarded as having a vested interest in the nature of a remainder in the chattel and not an executory interest. Appendix F is mainly devoted to an examination of these two views.¹

§ 87. There is no restraint on the creation of equitable interests in chattels personal.

§ 88. *American Law.* — Coming to the United States, future limitations in wills will first be taken up, and then those in deeds. *Wills.* — In America a future limitation by will of a chattel personal passes a legal interest. This has not only been said in many cases in which the parties' equitable rights were in controversy, but has been expressly determined in suits at law.² Even in North Carolina, where, as will be seen, a

¹ See also 24 Law Quart. Rev. 431.

² *Smith v. Bell*, 6 Pet. 68, 78. *Griggs v. Dodge*, 2 Day, 28. *Taber v. Packwood*, *Ib.* 52. *Moffat v. Strong*, 10 Johns. 12, 18. *Smith v. Van Ostrand*, 64 N. Y. 278. *State v. Warrington*, 4 Harring. 55. *Dashiell v. Dashiell*, 2 Har. & G. 127. *Royall v. Eppes*, 2 Munf. 479. *Bartlett v. Patton*, 33 W. Va. 71. *Keating v. Reynolds*, 1 Bay, 80. *Henry v. Means*, 2 Hill (S. C.) 328. *Rogers v. Randall*, 2 Speers, 38. *Marshall v. Rives*, 8 Rich. 85. *Russell v. Kearney*, 27 Ga. 96. *Lott v. Meacham*, 4 Fla. 144. *Adie v. Cornwell*, 3 T. B. Monr. 276. *Moore v. Howe*, 4 T. B. Monr. 199. *Thrasher v. Ingram*, 32 Ala. 645. See *Sampson v. Randall*, 72 Me. 109; *Albee v. Cummings*, 12 Cush. 382, 387; *Thomas v. Castle*, 76 Conn. 447; *Westcott v. Cady*, 5 Johns. Ch. 334; *Deihl v. King*, 6 S. & R. 29; *Culbreth v. Smith*, 69 Md. 450; *Hill v. Hill*, Dudl. Eq. 71, 83, 84; *Horry v. Glover*, 2 Hill, Ch. 515, 523; *Riley*, Ch. 53; *Philips v. Crews*, 65 Ga. 274; *Waldo v. Cum-*

tings, 45 Ill. 421; *Trogon v. Murphy*, 85 Ill. 119; *McCall v. Lee*, 120 Ill. 261; *Bowling v. Dobyns*, 5 Dana, 434; *Jackson v. Sublett*, 10 B. Monr. 467; *Maulding v. Scott*, 13 Ark. 88; *Damon v. Dickson*, 7 Hawaii, 694; *State v. Welsh*, 175 Mo. Ap. 303. It was so held in Virginia, in several cases, as early as 1736. *Edmonds v. Hughes*, 1 Jeff. 2. *Waddy v. Sturman*, *Id.* 5. *Jones v. Langhorn*, *Id.* 37. *Spicer v. Pope*, *Id.* 43.

It has been said of future limitations of personal property that "although allowed," they "are certainly not to be favored; it is with reluctance that they have been sanctioned by our courts; and they will lean against the creation of them, either by deed or will." *Brewster v. McCall*, 15 Conn. 274, 291; and see *Kirkpatrick v. Davidson*, 2 Ga. 297, 301, 302. But the correctness of such a general proposition may be doubted. See *Banks v. Marksberry*, 3 Lit. 275, 279; *Welsch v. Belleville Bank*, 94 Ill. 191, 204.

future limitation of a chattel personal by deed is bad, a future limitation by will of such chattel is good.¹

§ 89. That a future limitation by will gives a legal and not merely an equitable interest appears to be universally held to be law in America. The sole exception, if it be an exception, is *Homer v. Shelton*.² In that case personal property was bequeathed to A., with an executory bequest over, should A. at his death leave only one child. The question in dispute was whether A. was entitled to possession of the property without giving security. The Court held that as A. was the absolute owner of the property, he was entitled to the possession of it without giving security; but that he would hold it "in trust, subject to the limitation over." It is certainly not clear that the Court meant to decide that the executory bequest gave an equitable interest only. As was natural in a court having then no equitable jurisdiction, equitable terms such as "trust" were loosely employed. It does not seem that the decision would have been affected by the fact of the gift over being legal rather than equitable. The result of holding an executory bequest of a chattel personal to give only an equitable interest would, as has been said,³ be very important; for, if such were the case, the legatee for life could pass the property to a *bona fide* purchaser, free from any

¹ *Jones v. Zollicoffer*, N. C. Term Rep. 212. *Burnett v. Roberts*, 4 Dev. 1. *Knight v. Wall*, 2 Dev. & B. 125. *Knight v. Leak*, Id. 133. *Threadgill v. Ingram*, 1 Ired. 577. *Carter v. Spencer*, 7 Ired. 14. In *Jones v. Zollicoffer*, it was expressly held that a purchaser without notice from the person having the life interest could not hold as against those entitled under the executory bequest; and see *Burnett v. Roberts*, *ubi sup.*; and *Braswell v. Morehead*, Busb. Eq. 26. Cf. also *Russell v. Kearney*, 27 Ga. 96.

In Alabama it has been held that

if one to whom a chattel has been bequeathed for life assigns it by what purports to be an absolute conveyance, the right of those having the future interest is discontinued, and turned into a chose in action. *Broome v. King*, 10 Ala. 819. *Price v. Talley*, 18 Ala. 21. But this seems to be the employment of a nomenclature and ideas foreign to the modern law of personal property. See *Pickett v. Doe d. Pope*, 74 Ala. 122; and § 90, *post*.

² 2 Met. 194, 206, 207.

³ See § 86, *ante*.

claim under the executory bequest. Until a more express decision than *Homer v. Shelton*, it will not be safe to assume that the courts of Massachusetts mean to depart from what is now everywhere else the accepted doctrine in America.¹

§ 90. After an absolute bequest of personalty, any future limitation must be an executory bequest;² whether, after a bequest of personalty for life, a future limitation is to be regarded as in the nature of a remainder according to the first theory mentioned above,³ or as an executory bequest, is not, except on the question of remoteness,⁴ important, for the future interest is, on either theory, a legal one.

§ 90 *a*. But if a chattel personal is bequeathed to one for his life, and nothing is said in the will as to its destination, then it becomes necessary to decide between the two theories. If the legatee has the absolute interest, then as there is no gift over, the chattel must pass on the legatee's death to the legatee's executor as part of his estate. It is so held in Delaware.⁵ But if the legatee has only the use and occupation of the chattel, then on the legatee's death, it reverts to the testator's executor. This, which is believed to be the correct view,⁶ is the prevailing one in the United States.⁷

§ 91. *Deeds*. — It is the common opinion in the United

¹ And is probably also the law in England. §§ 85, 86, *ante*. See, however, *Chisholm v. Starke*, 3 Call, 25; and in *Glover v. Condell*, 163 Ill. 566, a future limitation of personalty is called an equitable interest.

² On the erroneous notion which has sometimes found expression, that there can be no executory limitation after an absolute bequest of personalty, see App. F, §§ 846, 847, *post*.

³ §§ 85, 86 *a*, *ante*.

⁴ As to which see App. F, §§ 838-841, 851.

⁵ See App. F, § 852, *post*.

⁶ See § 86 *a*, *ante*.

⁷ See cases cited, App. F, § 852, *note*, *post*. The question does not seem to have arisen in England with regard to chattels personal. In the case of a term for years it has been held that there is a reversion to the testator's executor. *Eyres v. Faulkland*, 1 Salk. 231, although this seems contrary to the theory as to chattels real maintained in England. See § 71 *b*, *ante*; App. F, §§ 842, 856, *post*.

The notes to § 90 in the first edition of this book, the author now believes to be incorrect.

States that a future limitation of a chattel personal as a legal interest can be created by deed as well as by will. Thus, upon the gift of a chattel to A. for life, and after his death to B., B. takes a legal interest.¹ So upon the gift of a chattel to A., but if he dies without leaving issue at his death then to B., B. has a legal interest.² So, if he dies in the lifetime of C.³ And in like manner, upon a gift by deed of a chattel personal to take effect on the death of the donor, the donee, on the death of the donor, becomes entitled to possession as legal owner.⁴

¹ *Tucker v. Stevens*, 4 Des. 325. *M'Call v. Lewis*, 1 Strob. 442. *Nix v. Ray*, 5 Rich. 423. (*Cooper v. Cooper*, Brevard MSS. Rep.; 1 Rice, So. Car. Dig. 207, *contra*, is overruled.) *Sharman v. Jackson*, 30 Ga. 224. *Keen v. Macey*, 3 Bibb, 39. *Price v. Price*, 5 Ala. 578. *Williamson v. Mason*, 23 Ala. 488. See *Sampson v. Randall*, 72 Me. 109, 112; *Fuller v. Fuller*, 84 Me. 475, 481; *Bradley v. Mosby*, 3 Call, 50; *Kirkpatrick v. Davidson*, 2 Ga. 297, 301; *Owen v. Cooper*, 46 Ind. 524; *McCall v. Lee*, 120 Ill. 261; *Aikin v. Smith*, 1 Sneed, 304; *Lyde v. Taylor*, 17 Ala. 270; *Jones v. Hoskins*, 18 Ala. 489; *Harris v. McLaran*, 30 Miss. 533, 568, 569.

² *Hill v. Hill*, Dudl. Eq. 71. See *Powell v. Brown*, 1 Bail. 100; *Welch v. Kinard*, Speers Eq. 256, 262; *Henderson v. Kinard*, 29 So. Car. 15. In *Betty v. Moore*, 1 Dana, 235, 237, there was a gift by parol of the absolute interest in a slave on condition that if the donee should die without children, the slave should revert to the donor. This conditional or reversionary gift was held void, although an executory devise to the same effect would have been good. In *Wilson*

v. Cockrill, 8 Mo. 1, the testator gave certain slaves to A., her executors, administrators, and assigns, and other slaves to B., his executors, administrators, and assigns, but should either die without heirs, "then the property of the one so dying shall absolutely vest in the other." A. and B. were children of the testator. A. died without issue; the gift over to B. was held void. It is not easy to follow the reasoning of the Court. If the decision means that an executory gift by deed of personalty is bad, although it might be good by will, this case and *Betty v. Moore*, *ubi sup.*, seem to be the only cases in the United States, outside of North Carolina, to support such a distinction. See App. F, § 847, *post*.

³ *Security Co. v. Hardenburgh*, 53 Conn. 169.

⁴ *Dukes v. Dyches*, 2 Strob. Eq. 353, note. *Dawson v. Dawson*, Rice, Eq. 243, 261. *Jaggers v. Estes*, 2 Strob. Eq. 343, 378, 397. (*Vernon v. Inabnit*, 2 Brev. 411, and the *dictum* in *Ingram v. Porter*, 4 McCord, 198, *contra*, are overruled.) *Robinson v. Schly*, 6 Ga. 515. *McGlawn v. McGlawn*, 17 Ga. 234. *Horn v. Gartman*, 1 Fla.

§ 92. In North Carolina alone is the opposite doctrine held. There, upon a gift of a chattel personal by deed to A. for life, and upon A.'s death to B., or to A. with an executory limitation over to B. upon a definite failure of A.'s issue for life, the gift to B. is void.¹ And so if, in a gift of a chattel personal by deed to A., the chattel is reserved to the grantor for his life, the gift to A. is void.²

§ 93. In 1823 the Legislature of North Carolina enacted³ that "Every limitation by deed or writing of a slave or slaves, which limitation, if contained in a last will and testament, would be good and effectual as an executory devise or bequest, shall be and is hereby declared to be a good and effectual limitation in remainder of such slave or slaves, and any limitation made or reserved to the grantor, vendor, or donor, in any such deed or writing, of a slave or slaves, shall be good and effectual in law: *Provided* such limitation, had it been made to another person, would be good and effectual according to the preceding clause: *Provided, also*, that all such deeds or writing shall be proved, witnessed, and registered."⁴ The

73. *Banks v. Marksberry*, 3 Lit. 275. *Caines v. Marley*, 2 Yerg. 582. *Johnson v. Mitchell*, 1 Humph. 168, 173. *Adams v. Broughton*, 13 Ala. 731. *Gullett v. Lamberton*, 6 Ark. 109. See *Hope v. Hutchins*, 9 G. & J. 77; *Culbreth v. Smith*, 96 Md. 450.

¹ *Cutlar v. Spillar*, 2 Hayw. 130. *Gilbert v. Murdock*, Id. 182. *Dowd v. Montgomery*, 2 Car. Law Rep. 100. *Smith v. Tucker*, 2 Dev. 541. *Hunt v. Davis*, 3 Dev. & B. 42. *Harrell v. Davis*, 8 Jones, 359.

² *Graham v. Graham*, 2 Hawks, 322. *Foscue v. Foscue*, 3 Hawks, 538. *Sutton v. Hollowell*, 2 Dev. 185. *Morrow v. Williams*, 3 Dev. 263. *Hunt v. Davis*, 3 Dev. & B. 42. *Foscue v. Foscue*, 2 Ired. Eq. 321. The case of *Duncan v. Self*,

1 Murph. 466, *contra*, is overruled; and *Timms v. Potter*, 1 Hayw. 234, apparently *contra*, is explained in *Gilbert v. Murdock*, 2 Hayw. 182. See *Vass v. Hicks*, 3 Murph. 493; *Hughes v. Cannon*, 2 Humph. 589.

³ Rev. Sts. c. 37, § 22.

⁴ For cases under this Statute, see *Tillman v. Sinclair*, 1 Ired. 183; *Bonner v. Latham*, Id. 271; *Baldwin v. Joyner*, 1 Ired. 123; *Sutton v. Craddock*, 1 Ired. Eq. 134; *Murphy v. Merritt*, 3 Jones, 37; *Parish v. Merritt*, Id. 38; *Holton v. McAllister*, 6 Jones, 12. The Statute was held not to apply to the case of a gift of a slave for life, with no limitation over. *Newell v. Taylor*, 3 Jones, Eq. 374, but this was remedied by the Revised Code of 1854, c. 37, § 21, which provided that

Statute applies only to slaves; as to all other chattels personal the law remained and remains as it was before the Statute;¹ and the courts of North Carolina presume the law in other States to be like their own common law.²

§ 94. It might perhaps have been thought that in North Carolina, although an executory gift by deed passed nothing at law, yet the first taker might be held a trustee for those to whom the gift over was made;³ but this does not appear to have been ever held; and, on the contrary, it was decided in *Butler v. Godley*⁴ that on a deed of a slave to A. in trust for himself for life, and afterwards in trust for B., A.'s interest was absolute, and B. took nothing in equity.⁵

§ 95. In the United States, outside of North Carolina a gift *inter vivos* of a chattel personal, after a life interest (whether such gift is to be regarded as vested or executory⁶) has always been held valid; and (except in the cases of *Betty v. Moore* and *Wilson v. Cockrill*⁷) the same has been held when the first gift does not purport to be for life, but to be of an absolute interest, and the gift over must therefore be, of course, executory.⁸

§ 96. It being the generally accepted doctrine that a parol gift of a chattel personal can be effected only by delivery,⁹ it

"Every kind of estate in slaves, be the same vested or contingent, or for life or for years, which is allowed to be created and limited by any last will or testament, may be created and limited by way of reservation, remainder, *reversion*, or otherwise, by any written conveyance of slaves."

¹ *Lance v. Lance*, 5 Jones, 413. *Dail v. Jones*, 85 N. C. 221.

² *Griffin v. Carter*, 5 Ired. Eq. 413. *Brown v. Pratt*, 3 Jones, Eq. 202.

³ See *Hill v. Hill*, Dudl. Eq. 71, 83.

⁴ 1 Dev. 94.

⁵ See *Harrell v. Harrell*, 5 Jones, Eq. 229. Upon the gift of a chattel personal by deed to A. in trust for the grantor for life, but upon the grantor's death in trust for himself, A., after the grantor's death, was held entitled at law to the property. *Lewis v. Lewis*, 1 Jones, 444.

⁶ See § 86 *a*, *ante*.

⁷ See these cases stated, § 91, note, *ante*. See also *Young v. Young*, 80 N. Y. 422, 440; *Welsch v. Belleville Bank*, 94 Ill. 191, 205; *Bunch v. Nicks*, 50 Ark. 367, 376. Cf. App. F, §§ 846, 847, *post*.

⁸ See § 90, *ante*.

⁹ See § 77, *ante*.

has often been held that a parol gift to take effect on the death of the donor is bad.¹ The reason does not apply when a parol gift of a chattel personal to A. for life, with a limitation on A.'s death to B., is accompanied by a delivery of the chattel to A.; but it has nevertheless been held in *Kirkpatrick v. Davidson*² and *Deer v. Devin*³ that such a future limitation on a parol gift is void.⁴ But in *Brummet v. Barber*⁵ a future limitation on a gift, with delivery, of a chattel, evidenced by a writing not under seal, was held good; and this seems the sounder view; and in *Knight v. Donahoo*⁶ a parol gift, with delivery, of a chattel for life and remainder was held good for both the life interest and the interest in remainder.

§ 97. We have seen⁷ that it has sometimes been held that on a bequest for life of a chattel personal with no gift over, there was no reversionary interest; but also that the better-supported doctrine seems to be that a reversionary interest is as valid as an executory bequest. So it has been held that on a gift *inter vivos* of a personal chattel to A., an executory limitation over to the donor is good.⁸

III. SUMMARY.

§ 98. The result of the investigation pursued in the present chapter is this: Originally the creation of future interests at law was greatly restricted, but now, either by the Statutes of

¹ *Young v. Young*, 80 N. Y. 422.
Pitts v. Mangum, 2 Bail. 588.
M'Ginney v. Wallace, Riley, 290.
Jaggers v. Estes, 2 Strob. Eq. 343,
 378, 397. *Bennett v. Cook*, 28 So.
 Car. 353. *Payne v. Lassiter*, 10
 Yerg. 507.

² 2 Ga. 299. So *Maxwell v. Harrison*, 8 Ga. 61, 67; *Yarborough v. West*, 10 Ga. 471.

³ 1 Humph. 66.

⁴ And see to the same effect *Fitzhugh v. Anderson*, 2 Hen. & M. 289, 302; *London v. Turner*, 11

Leigh, 403, 412; *Hallum v. Yourie*, 1 Sneed, 369.

⁵ 2 Hill (S. C.) 543, 549.

⁶ 3 B. Monr. 277. Cf. *Betty v. Moore*, 1 Dana, 235.

⁷ See § 90 *a*, *ante*.

⁸ *Higgenbotham v. Rucker*, 2 Call, 313. *Johnson v. Johnson*, 104 Ky. 714. See *Betty v. Moore*, 1 Dana, 235, 237; *Wilson v. Cockrill*, 8 Mo. 1, 7; § 91, note, *ante*. Cf. the common case of a chattel mortgage, observed upon in *Hill v. Hill*, Dudl. Eq. 71, 76.

Uses and of Wills, or by modern legislation, or by the gradual action of the courts, all restraints on the creation of future interests, except those arising from remoteness, have been done away.¹ This is true in the United States, save in North Carolina. In England and North Carolina it is true, with the exception that legal future interests in personalty cannot be there created *inter vivos*. This practically reduces the law restricting the creation of future interests to the Rule against Perpetuities.

¹ See *Glover v. Condell*, 163 Ill. 566, 592.

CHAPTER III.

VESTED AND CONTINGENT INTERESTS.

§ 99. THUS far has been considered what future interests in property can be created. Before discussing the application of the Rule against Perpetuities to them, a distinction should be pointed out between vested and contingent interests. To do so is the object of this chapter. The distinction is of great importance as concerns the Rule against Perpetuities, for a true¹ vested interest is never obnoxious to the Rule, while a contingent interest not only may be, but often is. The vesting of interests in real and in personal estate will be considered separately.

I. REAL ESTATE.

§ 100. *Remainders*. — Originally the word *vestire* meant to put in possession of land; to deliver the seisin.² When, instead of granting the fee to one person, a particular estate was given to one and the remainder to another, the remainderman was vested with a portion of the fee. Mr. Hawkins seems quite correct in saying that the word "vested" had originally no reference to the absence of contingency. A remainder was said to be vested, because the remainderman had a portion of the fee of which livery of seisin had been made.³ Indeed,

¹ See §§ 110 *a*, 205, *post*.

² Ducange, *sub voc.* 2 P. & M. Hist. Eng. Law (2d ed.) 32, 85.

³ Hawkins, Wills (2d ed.) 221. Cf. *Carney v. Kain*, 40 W. Va. 758, 822. See § 972, *post*.

In the common law freehold interests in land by way of remainder or reversion are called estates. This

is a peculiarly English conception. In other systems of law such interests take effect by way of substitution. Markby, *Elements of Law*, §§ 330, 331. 2 Holdsworth, *Hist. Eng. Law*, 296. § 971 *post*. They are analogous to shifting uses and executory devises in the English law. Freehold estates could be created

at first there seem to have been no contingent remainders.¹

§ 101. Since contingent remainders have been recognized, the line between them and vested remainders is drawn as follows: A remainder is vested in A., when, throughout its continuance, A., or A. and his heirs, have the right to the immediate possession, whenever and however the preceding freehold estates may determine.² A remainder is contingent if, in order for it to come into possession the fulfilment of some condition precedent other than the determination of the preceding freehold estates is necessary.³

only by livery of seisin, therefore freehold estates could not be created *in futuro*, but a continuous ownership of land might be cut up into a particular estate and remainder, and by giving livery of seisin to the first tenant, the estates in remainder were created. Lit. § 721. Co. Lit. 49 a, 143 a. But the ownership must be continuous. Challis, Real Prop. (3d ed.) 104.

On the idea of remainders in the earliest times see 2 P. & M. Hist. Eng. Law (2d ed.) 21; Professor Maitland in 6 Law Quart. Rev. 25, 26.

¹ Wms. Real Prop. (22d ed.) 361. 3 Holdsworth, Hist. Eng. Law, 91, 116-118. Scrutton, Land in Fetters, 115. 3 Enc. Laws of Eng. (2d ed.) 515.

² See Johnson v. Edmond, 65 Conn. 492, 499; Starnes v. Hill, 112 N. C. 1, 9; Storrs v. Burgess, 29 R. I. 269, 273.

³ Professor A. M. Kales has considered the nature of vested and contingent remainders in his treatise on Future Interests in Illinois, §§ 8-113, and in the following articles: 22 Law Quart. Rev. 250, 383; 24 Law Quart. Rev. 301;

20 Harv. Law Rev. 192; 8 Columbia Law Rev. 245; 3 Ill. Law Rev. 373, 379; 5 Ill. Law Rev. 381, 386. Professor Kales's views have been commented on by Professor Bingham, 5 Mich. Law Rev. 497, and by the author's learned friend, Archibald Graustein, Esq., 20 Harv. Law Rev. 243.

Professor Kales's views have undergone some modification, but his matured opinion is contained in a correspondence with which he has favored the author. In a letter of the date of October 27, 1911, he says (the italics are the author's): "The true view is that a remainder is contingent either (1) when limited on an event which may happen either before or at the time of or after the termination, whenever and in whatever manner, of the preceding particular estate, *in which case it is destructible by a rule of law defeating intent*; or (2) when it is subject to a condition precedent in fact and in form to its ever taking effect in possession, *in which case it is inalienable at law inter vivos*. On the other hand, a remainder to be vested must possess two characteristics:

§ 102. A remainder is none the less vested because it may terminate before the remainder-man comes into possession; thus if land be given to A. for life, remainder to B. for life, B. may die before A., yet the remainder is vested, for during its continuance, namely, the life of B., it is ready to come into possession whenever and however A.'s estate determines. This result is not affected by the fact that the termination of the remainder is contingent; that is, that it is subject to a condition subsequent. For instance, if land is devised to A. for life, remainder to B. and his heirs, but if B. dies unmarried then to C. and his heirs, B.'s remainder is vested, although it is possible that he may die unmarried in A.'s lifetime.

§ 103. The law favors the vesting of estates, and therefore prefers to construe conditions as subsequent rather than precedent;¹ so that when a condition attached to a remainder

(1) It must stand ready to take effect in possession, whenever and however the preceding estates may determine, *so that it is not destructible by a rule of law defeating intent*; and (2) It must not be subject to a condition precedent in form and in fact (other than the termination of the preceding estate) to its taking effect in possession, *so that it would be alienable inter vivos at law.*"

Two criticisms suggest themselves: *First.* Contingent remainders are often said to be destructible, but the expression is not strictly accurate. If a contingent remainder-man fails to come into possession, it is not because his estate is destroyed, but because he has never had an estate, but only the potentiality of an estate. When a remainder is said to be destructible, what is meant is that it needs a particular estate to support it, and that this estate is destructible. To call the remainder destructible avoids an inconvenient periphrasis,

and the use of the word with this meaning is so common, that it would be pedantic not to employ it. But to use the word when distinguishing vested from contingent remainders tends to bring about that confusion of conditions precedent and conditions subsequent which has been such a fruitful source of error, and had therefore best be avoided. *Second.* A contingent remainder is at common law inalienable; a vested remainder is not. But this incident, which is common to all interests on conditions precedent, does not affect the question whether a remainder is vested or contingent. In many jurisdictions contingent remainders have become alienable, but that does not prevent their continuing to be contingent remainders.

¹ See *Duffield v. Duffield*, 1 Dow & Cl. 268, 311. This rule, like all rules of construction, has at the present time less influence with the courts than it once had.

might take effect after it had come into possession, the condition will be deemed subsequent and the remainder vested, although the contingency may happen before the end of the particular estate, and so the remainder may never come into possession, as in the case put in the preceding section.

§ 104. One class of cases, however, presents some difficulty, that, namely, in which the contingency, if it happens at all, must happen at or before the termination of the particular estate, and the coming into possession of the remainder. Suppose, for instance, a gift to A. for life, remainder to B. and his heirs, but if B. dies before the termination of the particular estate, then to C. and his heirs. Here, if the condition ever affects B.'s estate at all, it will prevent it from coming into possession; it will never divest it after it has once come into possession. Remainders subject to conditions of this sort might have been regarded in three ways.

§ 105. (1) If the law looked on vested and contingent interests with an impartial eye, it would seem that such

See *Crapo v. Price*, 190 Mass. 317, 319, 320. As to whether the courts have not gone too far in disregarding rules of construction, cf. Gray, *Nature and Sources of the Law*, § 700.

Estates are construed as vested, not only by holding a condition subsequent rather than precedent, but often also by holding that there is no condition at all. Thus a devise to a widow for life if she did not marry again, but if she did, then to A., was held to give an estate to the widow till she married or died, and a vested remainder to A. *Luxford v. Cheeke*, 3 Lev. 125. So in the case, which is of daily occurrence in practice, where an estate is given to A. for life, and on his death to B., the remainder to B. is vested, and B. will take although

the particular estate should determine before A.'s death, by forfeiture or otherwise. *Doe d. Poor v. Considine*, 6 Wall. 458, and cases cited. Wms. *Real Prop.* (22d ed.) 349. The decisions to the contrary in New Hampshire, *Hall v. Nute*, 38 N. H. 422, and *Hayes v. Tabor*, 41 N. H. 521, were inexplicable aberrations of an able and learned but eccentric court. They were without any precedent, see 6 Alb. L. J. 361; and they have now been overruled in New Hampshire. *Kennard v. Kennard*, 63 N. H. 303. *Wiggin v. Perkins*, 64 N. H. 36. *Parker v. Ross*, 69 N. H. 213. Cf. *Bates v. Gillett*, 132 Ill. 287. But see *Starnes v. Hill*, 112 N. C. 1; *Richardson v. Richardson*, 152 N. C. 705.

remainders should be held contingent. A condition which may prevent an estate coming into possession, but which can never divest it after it has come into possession, is a condition in its nature precedent rather than subsequent. But the preference of the law for vested interests has prevented this view being adopted.¹

§ 106. (2) Such a condition might be regarded in all cases as a condition subsequent, the circumstance that the contingency must happen, if at all, at or before the end of the particular estate being regarded as immaterial. The effect of this construction would be to make a remainder vested at any time, if there was, at that time, a person ready and entitled to take possession as remainder-man, should the particular estate then determine, although, should the particular estate determine at some other time, such person might not be entitled to the remainder. Upon this theory, if there was a devise to A. for life, remainder to his surviving children, the remainder would be at any particular moment vested in the children who would survive A. should he at that moment die.

§ 107. The New York Revised Statutes seem to have defined a vested remainder in this sense: "Future estates are either vested or contingent. They are vested, when there is a person in being, who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are contingent, whilst the person to whom, or the event upon which, they are limited to take effect remains uncertain."² It is doubtful whether this piece of legislative definition was intended to change the common

¹ Cf. 5 Mich. Law Rev. 507.

² N. Y. Rev. Sts. pt. 2, c. 1, tit. 2, § 13. The phraseology of the Statute was altered by Laws of 1896, c. 547, § 30, and now reads: "A future estate is either vested or contingent. It is vested when there is a person in being, who would have an immediate right to the

possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain." See 4 Birdseye's Consol. Laws (1909) 4935.

law;¹ but the courts have decided, and it would seem correctly, that it has done so.² And it is conceived that the

¹ Chancellor Kent says this definition "appears to be accurately and fully expressed." 4 Kent, Com. 202. On Chancellor Kent's authority the Supreme Court of Alabama said that if a devise is made to a woman for life, and on her death to her children then living, the children take a vested remainder; but the decision would, it seems, have been the same had the remainder been held contingent. *Kumpe v. Coons*, 63 Ala. 448. See *Gindrat v. Western R.* 96 Ala. 162. But in *Smaw v. Young*, 109 Ala. 528, the Court acknowledged that in *Kumpe v. Coons* they had been misled by Chancellor Kent, and that the decision could not be sustained on principle, although a majority of the Court thought it must be followed as having settled a rule of property. But the common-law definition of a contingent remainder has now been restored by Ala. Code of 1907, § 3401. See *Lyons v. Bradley*, 168 Ala. 505, 513. The Supreme Court of New Hampshire adopted view (2) in *Cole v. Society*, 64 N. H. 445, 457, 458; but see *Hayward v. Spaulding*, 75 N. H. 92, and *Dana v. Sanborn*, 70 N. H. 152. So the Supreme Court of Vermont in *Wheeler v. St. Johnsbury*, 87 Atl. Rep. 349; and the Supreme Court of Indiana in *Wood v. Robertson*, 113 Ind. 323. The Supreme Court of Illinois adopted definition (2) in some cases (see *Kales*, Fut. Int. in Ill. §§ 94-113), but these cases have been overruled by *Golladay v. Knock*, 235 Ill. 412; but

see *Mettler v. Warner*, 243 Ill. 600. Chancellor Kent was also followed into the same error by Mr. Justice Swayne in *Croxall v. Shererd*, 5 Wall. 268, 288, a case in which land is said to have been "settled in apparently some sort of tail;" but where a contrary ruling would not have affected the decision. P. 290. This definition (2) is approved in *Iowa*, *Archer v. Jacobs*, 125 Iowa, 467, 475; *Shafer v. Tereso*, 133 Iowa, 342. Cf. *In re Haslett*, 116 Fed. Rep. 680; *Starnes v. Hill*, 112 N. C. 1, 12, 13; *Forsythe v. Lansing*, 109 Ky. 518. The case of *Farnam v. Farnam*, 53 Conn. 261, would seem, at first view, to have been decided on this theory; but in a later case in the same volume, *Andrews v. Rice*, Id. 566, there was a gift by will to trustees in trust to pay the income to the testator's daughter for life, and on her death to divide the principal into as many equal shares as the testator might have grandchildren or their issue then living, the issue of any deceased grandchild to be counted as one share, and the testator gave a share to each of said grandchildren, and a share to the issue then surviving of each deceased grandchild, and it was held that the grandchildren had a contingent interest. The decision in *Farnam v. Farnam* must therefore be considered as turning upon the special terms of the will in that case.

² See *Lawrence v. Bayard*, 7 Paige, 70; *Coster v. Lorillard*, 14 Wend. 265, 301, 302; *Mead v.*

adoption of this view necessitates the decisions of the Court of Appeals, which at first appear rather startling, that since the abolition of the Rule in *Shelley's Case* a remainder to heirs, after a life estate to the ancestor, is vested.¹

§ 108. (3) Neither of these views is that of the common law. Whether a remainder is vested or contingent depends upon the language employed. If the conditional element is incorporated into the description of, or into the gift to the remainder-man, then the remainder is contingent; but if, after words giving a vested interest, a clause is added divesting it, the remainder is vested. Thus on a devise to A. for life, remainder to his children, but if any child dies in the lifetime of A. his share to go to those who survive, the share

Mitchell, 17 N. Y. 210, 213; Connolly v. O'Brien, 166 N. Y. 406; Stringer v. Young, 191 N. Y. 157; Trowbridge v. Coss, 126 N. Y. Ap. D. 679; 195 N. Y. 596; Doscher v. Wyckoff, 132 N. Y. Ap. D. 139.

¹ Sheridan v. House, 4 Keyes, 569; 4 Abb. Ct. Ap. 218. Moore v. Littel, 41 N. Y. 66, reversing 40 Barb. 488. House v. Jackson, 50 N. Y. 161. See also Rome Bank v. Eames, 4 Abb. Ct. Ap. 83, 98; Chism v. Keith, 1 Hun, 589; Drake v. Lawrence, 19 Hun, 112; Matter of Brown, 29 Hun, 412; Lockman v. Reilley, Id. 434; Ramsay v. De Remer, 65 Hun, 212. But see Hennessy v. Patterson, 85 N. Y. 91, 104; Carmichael v. Carmichael, 4 Keyes, 346; 1 Abb. Ct. Ap. 309; and 6 Alb. L. J. 361. Cf. Purdy v. Hayt, 92 N. Y. 446, 454, 456; Hall v. La France Engine Co., 158 N. Y. 570; Richards v. Hartshorne, 110 N. Y. Ap. D. 650; Matter of Wilcox, 194 N. Y. 288. Mr. Stewart Chaplin, in his treatise on Suspension of Alienation, §§ 28-52, argues against the view that the

Revised Statutes changed the common law on vesting, and cf. 6 Columbia L. T. 96; 1 Columbia Law Rev. 279; 9 Columbia Law Rev. 587, 687. The New York Statute has been copied in Michigan, 3 Comp. Laws, § 8795; see Porter v. Osmun, 135 Mich. 361; and in Wisconsin, Annotated Stat. (1898), § 2037. See Scott v. West, 63 Wis. 529; *In re Moran's Will*, 118 Wis. 177; in which last case the distinction between the statutory definition and the common-law conception of a contingent remainder is pointed out; and McMichael v. Peterman, 140 Wis. 589. Cf. Los Angeles County v. Winans, 13 Cal. Ap. 234.

Cf. also Den. d. Hopper v. Demarest, 1 Zab. 525; 2 Zab. 599; under a statute, construing a remainder to heirs after a life estate to A. as a remainder to A.'s children; Croxall v. Shererd, 5 Wall. 268, 288; Fields v. Lewis, 118 Ga. 573; Kales, Fut. Int. in Ill. §§ 271-273; 1 Ill. Law Rev. 323.

of each child is vested, subject to be divested by its death.¹ But on a devise to A. for life, remainder to such of his children as survive him, the remainder is contingent.²

¹ Littlejohns v. Household, 21 Beav. 29. Thaw v. Ritchie, 136 U. S. 519, 546. Parker v. Ross, 69 N. H. 213. Blanchard v. Blanchard, 1 Allen, 223. Lenz v. Prescott, 144 Mass. 505. (See Gibbens v. Gibbens, 140 Mass. 102.) Carpenter v. Perkins, 83 Conn. 11. *In re Rogers' Trust Estate*, 97 Md. 674. Walker v. Alverson, 87 So. Car. 55. Jeefers v. Lampson, 10 Ohio St. 101. Moores v. Hare, 144 Ind. 573. (See Wood v. Robertson, 113 Ind. 323.) Ducker v. Burnham, 146 Ill. 9. Hinrichsen v. Hinrichsen, 172 Ill. 462. Mettler v. Warner, 243 Ill. 600. L'Etourneau v. Henquenet, 89 Mich. 428. Callison v. Morris, 123 Iowa, 297. Mercantile Bank v. Ballard, 83 Ky. 481. Forsythe v. Lansing, 109 Ky. 518. See Den d. Hopper v. Demarest, 1 Zab. 525; 2 Zab. 599; Clark v. Cox, 115 N. C. 93.

² Doe d. Planner v. Scudamore, 2 B. & P. 289. Whitby v. Von Luedecke, [1906] 1 Ch. 783. Robinson v. Palmer, 90 Me. 246. (See Spear v. Fogg, 87 Me. 132.) Olney v. Hull, 21 Pick. 311. Nash v. Nash, 12 Allen, 345. Thomson v. Ludington, 104 Mass. 193. Brown v. Williams, 5 R. I. 309. Alverson v. Randall, 13 R. I. 71. R. I. Hosp. Trust Co. v. Harris, 20 R. I. 408. Andrews v. Rice, 53 Conn. 566. Van Tilburgh v. Hollinshead, 1 McCart. 32. Delbert's Appeal, 83 Pa. 462. List v. Rodney, Id. 483. Mergenthaler's Appeal, 15 W. N. C. (Pa.) 441. Coggin's App. 124 Pa. 10. Craige's App. 126 Pa.

223. Raleigh's Estate, 206 Pa. 451. Vashon v. Vashon, 88 Va. 170. Howbert v. Cawthorn, 100 Va. 649. Allison v. Allison, 101 Va. 537. Whitesides v. Cooper, 115 N. C. 570. (See Bowen v. Hackney, 136 N. C. 187, 200.) Faber v. Police, 10 So. Car. 376. McElwee v. Wheeler, Id. 392. Bouknight v. Brown, 16 So. Car. 155. Stephens v. Evans, 30 Ind. 39. Golladay v. Knock, 235 Ill. 412 (see § 107, note, ante). Johnson v. Jacob, 11 Bush, 646. Emison v. Whittlesey, 55 Mo. 254. De Lassus v. Gatewood, 71 Mo. 371. Buxton v. Kroeger, 219 Mo. 224. Los Angeles County v. Winans, 13 Cal. Ap. 234. Hall v. Wright, 17 Cal. Ap. 502. D'Abbadie v. Bizoin, Ir. R. 5 Eq. 205, 210. 4 Kent, Com. (12th ed.) 203, note 1. Wms. Real Prop. (22d ed.) 365. Cf. Sulley v. Barber, 59 L. T. R. 824.

Mr. Williams's definition of a vested remainder is an estate "which is always ready, from its commencement to its end, to come into possession the moment the prior estates, be they what they may, happen to determine." Judge Holmes, in his note to Kent's Commentaries, *loc. cit.*, criticises this definition of Mr. Williams as if it was equivalent to that contained in the New York Revised Statutes, and common in textbooks, which declares, in substance, that a remainder is vested at any moment, if at that moment there is a remainder-man ready to take possession should the particu-

§ 109. There are three kinds of vested remainders which call for a word of special mention: (1) Remainders to a class. (2) Remainders after estates tail. (3) Remainders in default of appointment.

§ 110. (1) *Remainders to a Class*.¹—Sometimes a remainder is given to a class of persons, e. g. to children, the number of members in which may be increased between the time of creating the remainder and the termination of the particular estate; for instance, on a devise to A. for life, remainder to the children of A. and their heirs as tenants in common. Here, although it is certain that each child born, or its heirs, will have a share in the estate, that share will be diminished by the birth of every other child of A. Each child, nevertheless, on its birth is said to have a vested remainder. The

lar estate then determine, although, should that estate determine at another time, some other remainderman might be entitled to the same remainder. Judge Holmes shows clearly the unsoundness of this definition. But is this Mr. Williams's definition? His meaning would rather seem to be the correct one, that a remainder is vested in a man if he is ready and entitled during the continuance of the remainder to take the land whenever and however the preceding estate determines.

The ambiguity and error in the definition of vested remainders have arisen in part from considering them abstracted from the persons to whom they belong. A vested remainder is, *ex vi termini*, vested in somebody, and if the subject is approached from the side of the remainder-man, some of the difficulty disappears.

In the simple typical cases given in the text it is easy to apply the rule of the common law, but as

the vesting or contingency of a limitation depends upon the language employed, the determination whether it is vested or contingent is a matter, often a difficult matter, of construction; but as such it has no place in this treatise, which does not profess to deal with questions of construction. The fullest statement of the English cases is in 2 Jarm. Wills (6th ed.) 1352 *et seq.* See also Theobald on Wills (7th ed.) 566 *et seq.*, and Hawkins on Wills (2d ed.) 237–242, 283–290. In 1 Tiffany, Real Prop. §§ 120–122, 141–144, there is an excellent statement of the law and an accurate citation of many American cases in point.

¹ A class is a number of persons having a common characteristic. By a gift to a class is meant a gift to persons, the share of each of whom is determined by the number of the class to which he belongs.

remainder is said to "open" and let in the after-born children.¹ So when the remainder is to an individual and a class, as to A. and the children of B.²

§ 110 *a*. The placing this class of remainders under the head of vested remainders is to some extent artificial. Such a remainder is vested, in so far as it is certain that whenever and however the preceding estate determines there will be one or more persons who will surely come into possession of the land, but in so far as it is not certain what the number of those persons will be, or in other words as the number and consequent size of the shares is contingent, the remainder cannot be truly said to be in all respects vested. The imperfect character of the vesting in this class of cases is brought out by the application of the Rule against Perpetuities. Interests which are truly and in all respects vested, never come within the Rule, but when there is a gift in remainder to a class which has become vested in a living person, if the number of persons who will finally constitute the class may not be determined until a remote period, the remainder is void. For instance, suppose a devise to A. for life, remainder to his eldest son (unborn) for life, remainder to the grandchildren of B. B. is living and has had one grandchild, C., born to him. C. is said to have a vested remainder, but as the number of the grandchildren in whom the remainder is ultimately to vest in possession, and consequently the size of the shares, cannot be

¹ *Doe d. Comberbach v. Perryn*, 3 T. R. 484, 494, 495. *Carver v. Jackson*, 4 Pet. 1, 90. *Pingrey v. Rulon*, 246 Ill. 109. *Thomas v. Thomas*, 247 Ill. 543. *Archer v. Jacobs*, 125 Iowa, 467. *Fearne*, C. R. 312-314, Butler's note (c). 2 Jarm. Wills (6th ed.) 1667. See *A. G. v. Crispin*, 1 Bro. C. C. 386; *Devisme v. Mello*, Id. 537; *Lee v. Lee*, 1 Dr. & Sm. 85, 86; *Baldwin v. Rogers*, 3 De G. M. & G. 649, 656, 657; *Browne v. Hammond*, H. R. V. Johns. 210, 212, note (a);

McArthur v. Scott, 113 U. S. 340, 380; *Minot v. Purrington*, 190 Mass. 336; *Latta v. Lowry*, 11 Ont. 517. In Tennessee, by the local law, which it is admitted is contrary to the common law, a remainder to a class does not vest in the living members of the class. *Sanders v. Byrom*, 112 Tenn. 472. This makes the remainder contingent.

² See *Cooke v. Bowen*, 4 Y. & C. 244.

determined till too remote a period, the whole devise to the grandchildren is invalid as too remote. This is apparently an exception to the rule that vested interests are never too remote, but in truth remainders of this sort, although called vested, are not really so; at a certain point, and on the point which the Rule against Perpetuities touches, they are, in fact, contingent.¹

§ 111. (2) *Remainders after Estates Tail*. — On the passage of the Statute *De Donis*² remainders after estates tail took effect whenever and however the particular estates determined, and were therefore vested. But in the course of time, when, by recoveries or fines, estates tail and the remainders dependent on them could be barred, a remainder after an estate tail was not only postponed until the failure of the issue of the tenant in tail, but also became dependent on the contingency of the tenant in tail not suffering a recovery or levying a fine. The remainder, however, is still deemed vested. The barring of the estates by the tenant in tail is considered as in the nature of a condition subsequent divesting the whole series of estates, as well the particular estate tail as all the subsequent remainders.³

§ 112. (3) *Remainders in Default of Appointment*. — If

¹ See §§ 205 *a*, 205 *b*, *post*. The reason why a remainder to a class which might increase was called "vested" was undoubtedly, as suggested to the author by his learned friend, Roland R. Foulke, Esq., because "vested" had originally no reference to the absence of contingency, but only to seisin, and when there was a remainder-man *in esse*, the requirements of seisin were satisfied. When "vested" came to be opposed to "contingent," its application to a remainder to an increasable class was inappropriate. If we were making a new Rule against Perpetuities it might be well to disuse the term "vested" altogether

and to substitute "not subject to a condition precedent;" but the usage is so fixed that it seems best not to depart from it, but to show that such a remainder, notwithstanding its name, is subject to the Rule against Perpetuities. See §§ 201, 205 *a*, *post*.

² St. Westm. II. 13 Edw. I. c. 1 (1285).

³ Mr. Josiah W. Smith in his treatise on Executory Interests, § 192, says that a remainder after an estate tail is vested because a failure of issue "is considered certain to happen some time or other;" it is submitted that the reason given in the text is the sounder. Hawkins, Wills (2d ed.) 265.

in a settlement or will a power to appoint is given, and a remainder limited in default of appointment, the remainder is not rendered contingent by the fact that the execution of the power may destroy it.¹ When the remainder would be

¹ *Cunningham v. Moody*, 1 Ves. Sr. 174, 177. *Doe d. Willis v. Martin*, 4 T. R. 39. *Doe d. Tanner v. Dorvell*, 5 T. R. 518. *Woodman v. Woodman*, 89 Me. 128. *Grosvenor v. Bowen*, 15 R. I. 549. *Bonnell v. Bonnell*, 47 N. J. Eq. 540. *Lantz v. Massie*, 99 Va. 709. *Williman v. Holmes*, 4 Rich. Eq. 475. *Heilman v. Heilman*, 129 Ind. 59. *Railsback v. Lovejoy*, 116 Ill. 442. *Ducker v. Burnham*, 146 Ill. 9. *Harvard College v. Balch*, 171 Ill. 275. *Kirkpatrick v. Kirkpatrick*, 197 Ill. 144. *Burke v. Burke*, 259 Ill. 262. *Osbreys v. Bury*, 1 Ball & B. 53. *Heron v. Stokes*, 2 Dr. & W. 89, 99, 100. *Fearne*, C. R. 226-229. *Sugd. Pow.* (8th ed.) 452, 453. *Leonard Lovie's Case*, 10 Co. 78 a, 85 a, *contra*, is overruled. See *Walpole v. Conway*, Barnard. Ch. 153, 157; *Smith v. Camelford*, 2 Ves. Jr. 698. Cf. §§ 258, 535, *post*. In *Johnson v. Battelle*, 125 Mass. 453, 454, a remainder after a power is said to be "contingent on its not becoming necessary to exercise that power," and in *Taft v. Taft*, 130 Mass. 461, 464, 465, where the life tenant had a power to appoint by deed or will it is said that "the gift of the remainder to the plaintiffs is contingent upon the event that some estate remains at the death of the defendant not disposed of by her will. They thus take contingent remainders;" but these remarks were *dicta* entirely unnecessary to the decision of the cases; the attention of the Court appar-

ently was not called to the question whether the remainders were vested or contingent; and it seems hardly likely that the Massachusetts court, if the point is presented for decision, will hold contrary to the whole course of modern authority.

In *Minot v. Treasurer*, 207 Mass. 588, a statute passed in 1909 declared that where the donee of a power omitted to exercise it, a disposition of property should be deemed to take place as though the persons becoming entitled to the possession of such property had succeeded thereto by a will of the donee taking effect at the time of such omission, and should be subject to a succession tax. By a deed of 1844, N. had a life estate with power of appointment. N. died after the passage of the Statute, without exercising the power. It was held that the imposition of a succession tax on the property passing to the persons taking on default of appointment was not an unconstitutional violation of their vested rights. This refers to the vested rights mentioned in § 118, note, *post*, and has no reference to the question whether their interests were vested or contingent as those terms are used in the matter mentioned here.

See *Moore v. Weaver*, 16 Gray, 305. *Welsh v. Woodbury*, 144 Mass. 542, 545; *Peabody v. Tyszkiewicz*, 191 Mass. 317; *Lawrence v. Beardsley*, 74 Conn. 1. But cf. *Spaan v. Anderson*, 115 Iowa, 121.

contingent in the absence of the power, of course the presence of the power does not render it vested.¹

§ 112 *a*. That the existence of a power does not make a remainder in default of appointment contingent seems to be settled law everywhere (unless Massachusetts be an exception).²

§ 113. *Reversions*. — All reversions are vested interests. From their nature they are always ready to take effect in possession whenever and however the preceding estates determine.³

§ 113 *a*. When a reversion is assigned, it continues to be a vested interest with the assignee. In this way must be explained the case of *Egerton v. Massey*.⁴ A testatrix devised land to A. for life, remainder to the children of A. and their issue living at A.'s death, and in default of such issue to B. in fee; and she gave the residue of her estate to A. A. conveyed all her estate in the land to J., and died without ever having been married. It was held that, on the conveyance to J., A.'s life estate merged in her residuary interest, and that the contingent remainder to B. was destroyed. There was here a life estate, and a contingent remainder with a

¹ See an article by the author, 25 Harv. Law Rev. 22 *et seq.*, commenting on *Woodcock v. Renneck*, 4 Beav. 190; 1 Phil. 72; and *Lambert v. Thwaites*, L. R. 2 Eq. 151.

² See note 1 to preceding page. As an original question, this is very doubtful, but on the matter of remoteness, it is immaterial whether the remainder is vested or contingent. For assuming, as we do, that it would be vested in the absence of the power, it will either (1) if the power is not exercised, vest within the required limits, or (2) if the appointment under the power is in fee, it will be excluded altogether, or (3) if the appointments under

the power are of estates less than a fee, it will vest subject to the estates well appointed.

³ Where possibilities of reverter are allowed, as to which see §§ 31 *et seq.*, *ante*, they are vested interests.

⁴ 3 C. B. N. S. 338. A similar point arose in *Craig v. Warner*, 5 Mackey, 460; *Bond v. Moore*, 236 Ill. 576; *Barr v. Gardner*, 259 Ill. 256; *Belding v. Parsons*, 258 Ill. 422; *Archer v. Jacobs*, 125 Iowa, 467; *Bennett v. Morris*, 5 Rawle, 9. See *McCreary v. Coggeshall*, 74 So. Car. 42; *Cavaheer v. Lloyd*, 2 Commonwealth L. R. (Australia) 480, 508; 4 Ill. Law Rev. 355.

double aspect. If A. left issue at her death, the issue would take; if she did not leave issue at her death, then B. would take. Although these contingencies included every possibility, for A. must die either with or without leaving issue at her death, yet until the fee vested either in the issue or in B., it would, had there been no residuary gift, have remained in the heir of the testatrix as a reversion.¹ This reversion would have been destroyed by the condition subsequent of A.'s dying leaving issue, and also by the condition subsequent of A.'s dying without leaving issue; but until the one or the other of these conditions happened the reversion would have remained a vested interest in the heir. Such would have been the case had there been no gift of the residue. How did such gift affect the question? Four different views have been taken of such a case. (1) The gift of the fee contained in the residue has most of the characteristics of a remainder. It is a future estate, taking effect, if at all, at the termination of the particular estate and created by the same instrument.² But this residuary devise cannot be a vested remainder, for there cannot be a vested remainder after a contingent remainder in fee.³ (2) To obviate the difficulty in such a case of having a vested remainder after contingent remainders in fee, Mr. Preston suggested that such prior estates might be, not contingent remainders, but executory devises.⁴ *Egerton v. Massey*, however, negatives such a theory, for these prior estates were

¹ See § 11, *ante*.

² It seems immaterial that the residuary clause passes other property. A gift of the residue of the testator's real estate was specific, not only before the Wills Act of 1837 (the will passed upon in *Egerton v. Massey* was made in 1786), but is so even since that act. *Hensman v. Fryer*, L. R. 3 Ch. 420. *Lancefield v. Iggulden*, L. R. 10 Ch. 136. See 1 Prest. Est. 502; 2 Prest. Abs. 99.

³ *Loddington v. Kime*, 1 Salk. 224; 1 Ld. Raym. 203; 3 Lev. 431. (See *Doe d. Brown v. Holme*, 3 Wils. 237, 240; *Shaw v. Weigh*, 2 Stra. 798, 804.) *Doe d. Gilman v. Elvey*, 4 East, 313. *Fearne, C. R.* 225. But see *Hayes, Limit.* 81 *et seq.*; *Leake, Land Law*, 338, note (d).

⁴ 1 Prest. Est. 84, 502; and see 4 Jur. N. S. pt. 2, 108, 121, 133, 157.

held in that case to have been destroyed, which could not have happened had they been executory devises. (3) Again, it has been suggested that the interest of an heir after the devise of a contingent fee will not pass by a devise, either specific or residuary.¹ But this, too, is negatived by *Egerton v. Massey*. (4) The true view would seem to be that although a residuary devise is made by the same instrument which creates a particular estate, it is not part of one gift with it, and is therefore not a remainder. The gift of a "residue" implies that the former gift is completed. If Stiles grants a life estate to Doe, and afterwards conveys the residue of the estate to Roe, Roe has a grant of a reversion, and not a remainder; and although in a will the residuary gift is contained in the same instrument as the particular devise, yet the effect of the whole is to be regarded as the establishment of a particular estate with a reversion, and an independent transfer of that reversion, so established, to the residuary devisee.² It is noticeable that the judges in *Egerton v. Massey* always speak of the vested interest in which the life estate merged as a reversion and not as a remainder.³

§ 113 *b*. When an estate is given on a condition, the condition is always both precedent and subsequent; it is precedent as to the estate which is given on the condition, it is subsequent as to the estate which now exists and will continue to exist if the condition is not fulfilled. The vesting of an estate is not affected by the fact that it may be divested by a condition subsequent. In *Egerton v. Massey*, as far as the condition affected the reversion it was not a condition precedent, but a condition subsequent, and, therefore, the case of *Egerton v. Massey* and the statement in § 113, *ante*, that all reversions are vested, is, it is submitted, correct. There cannot be a vested remainder after a contingent remainder in fee simple.⁴ Why is it that after a contingent remainder in fee simple the reversion is vested, but

¹ 9 Jur. pt. 2, 50.

³ See *Johnson v. Edmond*, 65

² See 9 Jur. pt. 2, 50, 52. Cf. Conn. 492, 499.

28 Am. Jur. 388.

⁴ *Loddington v. Kime*, 1 Salk. 224; 1 Ld. Raym. 203; 3 Lev. 431.

a remainder is contingent? The reason is this. A remainder is created by the livery of seisin of the particular estate; if it is not ready to come into possession whenever and however the previous estates determine, it is a contingent remainder. A contingent remainder is, in truth, not an estate, but a possibility of an estate;¹ its becoming an estate depends upon the condition precedent of the first contingent fee simple limited not vesting; while a reversion is independent of the ownership created by the livery, it is an actual estate, and, therefore, any condition affecting it is a condition which, as to it, is subsequent.

§ 114. *Other Future Interests in Real Estate.* — No other future interests are vested. An interest to commence at a future time certain, e. g. an executory devise to go into effect ten years after the testator's death, cannot be called contingent; but neither is it vested. It is an executory limitation.² Thus: (1) *Rights to enter for condition broken* are not vested till breach of the condition. (2) *Rights less than ownership in land of others to begin in futuro* are not vested interests until they begin.³ (3) *Springing and shifting uses* and (4) *Executory devises* are not vested interests until they take effect in possession or are turned into vested remainders.⁴

§ 115. *Escheat.* — An exception to the statement at the beginning of the preceding section is the right to take by escheat. If this is a right at all, and it would certainly seem to be, it is a vested right.⁵

¹ See § 100, note, *ante*.

² Fearn, C. R. 1, Butler's note.

³ Of course, after a right less than ownership has begun, there may be a vested future estate in it. See Challis, Real Prop. (3d ed.) 51, 327; Wms. Real Prop. (22d ed.) 437, 442, 447.

⁴ An instance in which an executory devise is turned into a vested remainder would be the following: A devise to A. in fee, but

if he dies unmarried, then to B. for life, and on B.'s death to C. in fee. Here B. and C. have both executory devises; but on A.'s death, unmarried, B.'s estate is turned into an estate in possession, and C.'s estate into a vested remainder. See *Craig v. Stacey*, Ir. Term R. 249; *Storrs v. Burgess*, 29 R. I. 269, 275.

⁵ See §§ 204, 205, note, *post*. The right of the Crown or State to

§ 115 *a. Curtesy and Dower.*—The estate of a wife in dower, or of a husband, after the birth of issue, in curtesy, cannot be called either vested or contingent interests. They are executory limitations.¹

§ 116. *Equitable Interests.*—There are, strictly speaking, no equitable reversions or remainders. The so-called reversions are resulting trusts, and a remainder implies the presence of seisin and tenure, which are conceptions foreign to equitable interests. But to determine whether equitable interests are vested, or contingent or executory limitations, the same principles are to be applied as with legal interests.²

II. PERSONAL PROPERTY.

§ 117. After an absolute interest in personalty, just as after a fee simple in realty, every future limitation is executory and not vested; and as the only succession allowed in personalty is to executors or administrators, a gift to A. and his heirs, or to A. and the heirs of his body, or to A. simply, is taken to be an absolute gift to A. passing to his executors, and every limitation after such a gift is executory and not vested.³

An interest for years can be created in a chattel, either real or personal, and therefore when a limitation is ready to come into possession, whenever and however such interest for years determines, that limitation is vested.

§ 117 *a.* The difficulty arises when a chattel is given for life. Suppose a chattel personal, for instance a picture, is given to A. for life and on his death to B. Is the limitation to B. executory or vested? Marsden in his treatise on the

personal property when the owner dies without next of kin is, perhaps, a right to succeed as *ultimus heres*, and not a new right. § 205, note, *post.*

¹ See § 114, *ante.*

² The rule that a limitation

which can be construed as a contingent remainder cannot be construed as an executory devise does not apply to equitable interests. See §§ 324, 325, *post.* On this rule see App. J, § 918, *post.*

³ See App. F, §§ 805, 835, *post.*

Rule against Perpetuities¹ says it is "executory, and does not vest within the meaning of the Rule against Perpetuities until A.'s death. . . . The result, therefore, is that a future or executory limitation of personalty vests or takes effect within the meaning of the Rule when it takes effect in possession." Unquestionably this is in accordance with the theory of the modern English conveyancers, but the older, and it is submitted, the sounder view, is that A. has the use and occupation of the chattel only, and that B. has a vested interest, being ready to come into possession, whenever A.'s use and occupation is determined.² Whether the one or the other theory is correct is tested by a gift of a chattel to a living person, after a gift for life to an unborn person. Suppose, for instance, a picture is given to A. for life, on his death to his eldest son for life, and on the death of such eldest son to B., a living person, and his executors, A. at the time of the gift having no children. If the gift to B. in this case is executory, it is too remote; if it is vested, then it is good. All authority is in favor of its being good.³

¹ Pp. 43, 44.

² See § 86 *a*, *ante*.

³ *Routledge v. Dorril*, 2 Ves. Jr. 357, 362, 363, 366, 367. *Evans v. Walker*, 3 Ch. D. 211. *Re Roberts*, 19 Ch. D. 520. *Loring v. Blake*, 98 Mass. 253. *Seaver v. Fitzgerald*, 141 Mass. 401. See *Crosby v. Crosby*, 64 N. H. 77; *Lennig's Estate*, 31 W. N. C. (Pa.) 234, 236; 24 Law Quart. Rev. 431; App. F, §§ 838, 851, *post*.

The notion which at one time prevailed in Massachusetts, that a different rule of construction was to be applied in determining whether a (so called) remainder in personalty was vested, from that which was to be applied with regard to a remainder in real estate, was founded on a *dictum*

in *Dingley v. Dingley*, 5 Mass. 535, 537. See *Denny v. Allen*, 1 Pick. 147; *Emerson v. Cutler*, 14 Pick. 108; *Nash v. Cutler*, 16 Pick. 491. It is now completely overthrown. *Shattuck v. Stedman*, 2 Pick. 468. *Winslow v. Goodwin*, 7 Met. 363. *Childs v. Russell*, 11 Met. 16. *Wight v. Shaw*, 5 Cush. 56. *Bowditch v. Andrew*, 8 Allen, 339. *Gibbens v. Gibbens*, 140 Mass. 102.

In the first edition it was said that future limitations of personalty after life interests were executory, but were to be treated on questions of remoteness as if they were real estate. This worked well enough in practice as an empirical rule of thumb, but the view now presented in the text is much more satisfactory and is believed to be sound.

§ 117 *b*. There is more room for serious doubt in the case of chattels real. The theory always announced with regard to these, is that bequests of life interests in them carry the whole interest, because a life estate is larger and therefore cannot be less than a term for years.¹ If this theory is carried out consistently, then every limitation of a term for years following a gift of the term for life is executory, and may be too remote, when a like limitation of realty would be vested and valid. But it seems likely that this piece of legal reasoning will be unable to bear the stress of application to an actual case.²

§ 118. The term "vested" has been hitherto considered as it is used in questions of remoteness; but it has also another meaning, which is so frequently given to it, that it cannot be styled improper. Such double meaning is, however, very unfortunate, as it has led to much confusion.³ This other meaning of "vested" is "transmissible." Thus, if an estate is given to A. and his heirs, but if he dies unmarried then to B. and his heirs, here, in the first sense, B.'s interest is not vested, for it is subject to a condition precedent; in the second sense it is vested, for it is transmissible to B.'s heirs.⁴ The

¹ See §§ 71 *a*, 71 *b*, *ante*; App. F, §§ 807 *et seq.*, *post*.

² See App. F, §§ 816, 820, 856, *post*.

³ See *Johnson v. Edmond*, 65 Conn. 492, 499; *Carney v. Kain*, 40 W. Va. 758, 809. Indeed this ambiguity of meaning has been perhaps a chief factor in the production of the notion that presently alienable interests are never too remote. See Chap. VII., *post*.

⁴ See *Barnes v. Allen*, 1 Bro. C. C. 181, 182; *Taylor v. Frobisher*, 5 De G. & Sm. 191, 197, 198; *Storrs v. Burgess*, 29 R. I. 269; *Kelso v. Dickey*, 7 W. & S. 279; *M'Donald v. M'Mullen*, 2 Mills, Const. 91,

94; *Dickson v. Dickson*, 23 So. Car. 216; 1 Roper, Leg. (4th ed.) 550; *Marsden*, Perp. 42; and a series of cases in Massachusetts, *Dunn v. Sargent*, 101 Mass. 336; *Merriam v. Simonds*, 121 Mass. 198, 202; *Minot v. Tappan*, 122 Mass. 535; *Daniels v. Eldredge*, 125 Mass. 356; *Belcher v. Burnett*, 126 Mass. 230; *Russell v. Milton*, 133 Mass. 180, 181; *Whipple v. Fairchild*, 139 Mass. 262; *Minot v. Purrington*, 190 Mass. 336.

The introduction of this meaning of "vested" into the law may perhaps have been as follows: In certain classes of legacies, to be paid when the legatee reaches

Rule against Perpetuities does not concern itself with this secondary meaning of the word "vested." Thus, if an estate is devised to A. and his heirs, with an executory devise over to B. and his heirs in case A. or his heirs ever cease to bear the name of the testator, the executory devise to B. is vested in the secondary sense, because it is transmissible from B. to his heirs; but it is nevertheless too remote, for in the primary sense it is not vested, but contingent, — that is, it is subject to a condition precedent.¹

twenty-one or some other age named, the courts construe the gift as an absolute one to the legatee, his executors and administrators, and the direction with regard to payment as given solely for the benefit of or on account of the legatee; that is, they regard the legacy as certain to become payable in any event, — payable when the legatee reaches twenty-one (or other age), if he so long lives; but if he dies before that time, payable to his executors or administrators. Such a legacy was called vested, because it was certain to take effect in the legatee or his representatives. Now the fact that such a legacy was vested was brought out in practice by the circumstance that the executor of the legatee took it, and the incident of transmissibility thus came to be regarded as the essential characteristic of a vested interest, and gave rise to the secondary meaning of the term "vested." See Hawkins, Wills (2d ed.) 266, 267.

¹ Another use of the term "vested interest" should be noticed. "When it is said that the Legislature ought not to deprive

parties of their 'vested rights,' all that is meant is this: that the rights styled 'vested' are *sacred* or *inviolable*, or are such as the parties ought not to be deprived of by the Legislature. Like a thousand other propositions which sound speciously to the ear, it is either purely identical and tells us nothing, or begs the question in issue." 2 Aust. Jur. (3d ed.) 887, 888. See Lewis, Use of Political Terms, 32-34. This use of "vested" has passed from the domain of politics to that of law, by reason of the provisions in the 14th Amendment to the Constitution of the United States, and in most of the State Constitutions, that no one shall be deprived of his property "without due process of law," or "but by the law of the land." These provisions have generally been construed by the courts to prevent any general or special legislation taking away "vested rights," and have therefore called forth a somewhat more precise determination of the term. The cases will be found collected in Cooley, Const. Limit. c. 11. They do not concern us here.

CHAPTER IV.

POSTPONEMENT OF ENJOYMENT AND THE RULE
AGAINST PERPETUITIES.

§ 118 *a*. THE tying up of property, the taking of it out of commerce, can be accomplished either, first, by restraining the alienation of interests in it, or, secondly, by postponing to a remote period the arising of future interests. To guard effectually against this evil, as the law considered it, both these methods had to be provided against. The law provided against the first by the doctrine that all interests should be alienable; it provided against the second by the doctrine that all interests must arise within certain limits, — that is, by the Rule against Perpetuities.¹ These two doctrines, though having originally a common purpose,² have had a separate development. The attempts to combine them have led to much confusion.³

§ 119. Neither the common law nor equity allows restraints on the alienation of property, save in the case of property settled or devised to the separate use of married women or on charitable uses.⁴ The restraints imposed on estates tail by the Statute *De Donis* have long ceased to operate. It is true that life estates and estates for years may be made terminable on an attempt at alienation; but no interest, real or personal,

¹ On the history of the development of these two doctrines, see Chap. V., *post*, especially §§ 140 *et seq.*, and Gray, *Restraints on the Alienation of Property* (2d ed.).

² See 14 *Law Quart. Rev.* 234, 240, *note*.

³ See §§ 2-3, *ante*, 140-141 *f*, 234-237 *d*, 245 *c*-245 *f*, 268-278 *d*, 432-437 *b*, 567, 590, 591, 597-603 *h*,

736, 737, 743, 744, 748, 750, 898-908, *post*. The distinction between the rules governing restraints on alienation and the Rule against Perpetuities is stated: *Becker v. Chester*, 115 *Wis.* 90.

⁴ On the application of the Rule to Charitable Uses, see Chap. XVIII., *post*.

legal or equitable, can be held by any person, except a married woman, in such a way that he or she can enjoy the income or benefits thereof but cannot alienate it or subject it to his or her debts.¹

§ 120. A result of the invalidity of restraints on alienation calls for attention in connection with the Rule against Perpetuities. When a person is entitled absolutely to property, any provision postponing its transfer or payment to him is void.² Thus, suppose property is given to trustees in trust to pay the principal to A. when he reaches thirty. When any other person than A. is interested in the property, when, for instance, there is a gift over to B. if A. dies under thirty, the trustee will retain the property for the benefit of B.; but when no one but A. is interested in the property, when, should he die before thirty, his heirs or representatives would be entitled to it, when, in short, the direction for postponement has been made for A.'s supposed benefit, such direction is void, in pursuance of the general doctrine that it is against public policy to restrain a man in the use or disposition of property in which no one but himself has any interest.³

¹ In many of the United States restraints against alienation can be attached to equitable life interests given to men or to unmarried women. Trusts of this sort are known as spendthrift trusts. In several States, e. g. New York, such restraints are more or less permitted by statute. See the whole matter discussed in Gray, *Restraints on the Alienation of Property*. On the application of the Rule against Perpetuities to provisions restraining anticipation by married women and to spendthrift trusts, see §§ 432-438, *post*; and as to its application to provisions postponing the right to enjoy equitable fees or absolute interests in those States, like

Illinois and Massachusetts, where such postponement is allowed, see §§ 121 *c*, *et seq.*, *post*.

² Mr. Foulke, *Treatise*, § 486, says that a postponement of enjoyment is not a restraint on alienation. But the postponement of enjoyment restrains the owner of the absolute property from exercising the right, he would otherwise possess, of transferring the immediate right to its enjoyment, and may therefore, it seems, be properly called a restraint on alienation. See § 121 *a*.

³ *Josselyn v. Josselyn*, 9 Sim. 63. *Saunders v. Vautier*, 4 Beav. 115; *Cr. & Ph.* 240. *Curtis v. Lukin*, 5 Beav. 147, 155, 156. *Rocke v. Rocke*, 9 Beav. 66. *Swaffield v. Orton*, 1 De G. & Sm. 326. *Re*



§ 121. As such provisions are void, no question of remoteness can be raised with regard to them. If such a direction to pay or convey to a legatee at a period beyond the limit of the Rule against Perpetuities were a condition precedent to the right to enjoy, and were, apart from the Rule, valid, it would be bad as violating the Rule; but as it is invalid, apart from the Rule, the objection of remoteness does not apply to it.¹

Young's Settlement, 18 Beav. 199. Gosling v. Gosling, H. R. V. Johns. 265. *Re Jacob's Will*, 29 Beav. 402. *Coventry v. Coventry*, 2 Dr. & Sm. 470. *Christie v. Gosling*, L. R. 1 H. L. 279, 282. *Magrath v. Morehead*, L. R. 12 Eq. 491. *Hilton v. Hilton*, L. R. 14 Eq. 468, 475. *In re Johnston* [1894] 3 Ch. 204. *In re Thompson*, 44 W. R. 582. *Sanford v. Lackland*, 2 Dill. 6. *Huber v. Donoghue*, 49 N. J. Eq. 125. *Bennett v. Chapin*, 77 Mich. 526. *Rector v. Dalby*, 98 Mo. Ap. 189. See *Talbot v. Jevers*, L. R. 20 Eq. 255; *Weatherall v. Thornburgh*, 8 Ch. D. 261; *Re Parry*, 60 L. T. R. 489; *Weatherhead v. Stoddard*, 58 Vt. 623, 630; *Tarrant v. Backus*, 63 Conn. 277; *Conn. Trust Co. v. Hollister*, 74 Conn. 228, 232; *In re Carter*, 21 N. Z. L. R. 227. The cases of *Peard v. Kekewich*, 15 Beav. 166, and *Rhoads v. Rhoads*, 43 Ill. 239, cannot, it would seem, be supported. See Gray, *Restraints on Alienation* (2d ed.), §§ 109 *b*, 124.

¹ *Farmer v. Francis*, 2 Bing. 151; 9 Moore, 310; 2 S. & St. 505. *Murray v. Addenbrook*, 4 Russ. 407. *Bland v. Williams*, 3 Myl. & K. 411. *Doe d. Dolley v. Ward*, 9 A. & E. 582. *Blease v. Burgh*, 2 Beav. 221. *Jackson v. Majoribanks*, 12 Sim. 93. *Greet v. Greet*, 5 Beav. 123. *Davies v. Fisher*, Id. 201.

Milroy v. Milroy, 14 Sim. 48. *Harrison v. Grimwood*, 12 Beav. 192. *Tatham v. Vernon*, 29 Beav. 604. *Knox v. Wells*, 2 H. & M. 674. *Saumarez v. Saumarez*, 34 Beav. 432. *Edmondson's Estate*, L. R. 5 Eq. 389. *Willson v. Cobley*, [1870] W. N. 46. *Fox v. Fox*, L. R. 19 Eq. 286. *Mappin v. Mappin*, [1877] W. N. 207. *In re Bevan's Trusts*, 34 Ch. D. 716. *Rogers's Estate*, 179 Pa. 602. *Wright v. Hill*, 140 Ga. 554. *Re Levy*, 7 N. S. Wales St. Rep. 885. See *Taylor v. Frobisher*, 5 De G. & Sm. 191; *Oddie v. Brown*, 4 De G. & J. 179; *Baxter's Trusts*, 10 Jur. n. s. 845; *Kimball v. Crocker*, 53 Me. 263; *Lane v. Lane*, 8 Allen, 350; *Odell v. Odell*, 10 Allen, 1, 13, 14; *Wahl's Estate*, 20 Phila. 32, 26 W. N. C. (Pa.) 249; *Lewis, Perp. c. 22*, and *Suppl. 170, 171*; 1 Jarm. Wills (6th ed.) 303; *Marsden, Perp. c. 11*; *Harg. Thel. Act*, § 83. The case of *Bute v. Harman*, 9 Beav. 320, is wrongly reported. See *Boreham v. Bignall*, 8 Hare, 131, 133, note (*d*); *Southern v. Wollaston*, 16 Beav. 166.

When the postponement of the right to enjoy a vested interest is imposed for the benefit of third persons, such postponement seems to be in itself valid and therefore to come within the scope and operation of the Rule against Perpetui-

§ 121 *a*. A question, however, of some nicety may arise under this head. When there is a gift to a class, the class is closed and the number determined at the period of distribution. Thus, if there is an immediate bequest to the grandchildren of the testator, only those born at his death will take; after-born grandchildren are excluded. But, again, if there is a bequest to those grandchildren of the testator who reach twenty-one, all grandchildren born before the eldest living grandchild reaches twenty-one will take. And so, if there is a legacy to the grandchildren of a testator to vest immediately, but there is a direction that it shall not be paid until twenty years after the testator's death, although, as we have seen, such clauses postponing the possession of present vested interests are generally disregarded, yet in this case the payment will be postponed in order to give the class a chance to increase, and grandchildren born after the testator's death, but within the twenty years, will take.¹

§ 121 *b*. Suppose, now, there is an immediate vested legacy to the children of A., to be paid to them when they reach twenty-five; and suppose further,² *First*, that there are no children of A. born and four years old at the testator's

ties. See §§ 121 *a*, 121 *b*, 638 *et seq.*, *post*.

Sometimes property is given to a trustee in trust to pay the income to one or more of a class of persons at his discretion. In such a case no member of the class has any rights, nor consequently anything which he can alienate. The class, however, taken as a whole, has rights against the trustee. As to the application of the Rule against Perpetuities to such a provision, see §§ 246, 439, *post*.

When a gift to a class creates a vested right which is transmissible to the representatives of the members of the class, but there is a provision that payment shall be

postponed, for instance until a period of ten years from the death of a testator has expired, the provision is sustained for the purpose of allowing the class to increase. *Oppenheim v. Henry*, 10 Hare, 441. On the application of the Rule against Perpetuities to such a gift, see §§ 121 *a*, 121 *b*, *post*.

On the application of the Rule against Perpetuities to accumulations, see Chap. XX., *post*.

¹ *Oppenheim v. Henry*, 10 Hare, 441.

² This supposed case as it stood in the preceding edition has been corrected in accordance with a suggestion of Mr. Kales, 19 Harv. Law Rev. 598, note, 604, note.

death. Here, if the class is allowed to increase until a child reaches twenty-five, the number of the class may not be determined till too remote a period, the Rule against Perpetuities will be violated, and the gift to a class which may be so constituted will be bad; there is, then, no reason for sustaining the direction to postpone in the interest of increasing the class, and the provision is inoperative. But suppose, *Secondly*, there is a child of A. born and four years old at the testator's death. Whether the class will be allowed to increase depends upon whether the period of distribution is too remote. Now, if a child of A. dies under twenty-five, his executor or administrator is entitled to his share at the time when the child would have reached twenty-five.¹ The period of distribution must therefore be when the eldest child of A. living at the death of the testator reaches, or would have reached, if living, twenty-five. Such an event must happen at latest within twenty-one years after a life in being, to wit, the life of the eldest grandchild. As therefore the period of distribution and the determination of the class cannot be at too distant a period, there is no objection on the score of remoteness to allowing the class to increase till the period of distribution arrives.²

§ 121 *b b*. When a direction for postponement is a condition precedent to the enjoyment of a right, it would come, if otherwise valid, within the regulation of the Rule against Perpetuities. Such direction may take the form of a restraint on alienation, as where property is given to A. and his heirs in trust for B. and his heirs, with a proviso that the trust shall not be terminated for a certain number of years. As has been said, such a proviso being bad anyway, the time during which the trust is declared not determinable is immaterial. The Rule against Perpetuities has nothing to do with the matter. It is only future interests otherwise valid that come within the scope of the Rule.³

¹ *Chester v. Painter*, 2 P. Wms. 335. *Roden v. Smith*, Amb. 588. *Maher v. Maher*, 1 L. R. Ir. 22.

² See §§ 638 *et seq.*, *post*.

³ See *Re Levy*, 7 N. S. Wales St. Rep. 885.

§ 121 *c.* A local doctrine, adopted in Massachusetts in 1889, calls for notice. In *Clafin v. Clafin*¹ the Supreme Judicial Court of Massachusetts decided that if property is held by trustees for the sole absolute interest of A., but there is a proviso that they shall not transfer it to him until he reaches twenty-five, he cannot demand it till he arrives at that age.²

§ 121 *d.* Suppose, then, that in Massachusetts, by will, property is given to trustees for the sole absolute interest of the first son of A. (A. being now a bachelor), but there is a proviso that the property shall not be transferred to such son until he reaches twenty-five. A. marries, has a son born, and dies soon after. The son is now of age. What is to happen?

§ 121 *e.* The suggestion that the right to enjoy is a right independent of the vested property, and that such right to enjoy, being on a remote condition precedent, can never come into effect, though the vested interest exists, or in other words, that a man may have a vested interest which he can never by any possibility enjoy, is too absurd for consideration.

¹ 149 Mass. 19.

² *Clafin v. Clafin* is discussed, Gray, *Restraints on Alienation* (2d ed.) §§ 124 *l*–124 *p*.

The doctrine of *Clafin v. Clafin* seems to be law in Illinois. *Rhoads v. Rhoads*, 43 Ill. 239 (see Gray, *Restraints on Alienation*, § 124). *Lunt v. Lunt*, 108 Ill. 307. *Howe v. Hodge*, 152 Ill. 252. *Chapman v. Cheney*, 191 Ill. 574. *Flanner v. Fellows*, 206 Ill. 136. *Wagner v. Wagner*, 244 Ill. 101. See *Armstrong v. Barber*, 239 Ill. 389; *Wallace v. Foxwell*, 250 Ill. 616; *Kales, Fut. Int. in Ill.* §§ 223, 263 *et seq.*; 5 Ill. Law Rev. 318, 386; and it has been approved by the Supreme Court of the United States in a case from the District of Columbia. *Shelton v. King*, 229 U. S. 90.

On the other hand, though there is some obscurity in the Pennsylvania cases, yet *Shallcross's Estate*, 200 Pa. 122, makes it clear that the Supreme Court in that State contemplates no departure from the common law.

There was some, though slight, ground for thinking that the same notion had been adopted in Missouri (see Gray, § 53, and cases there cited), but in *Rector v. Dalby*, 98 Mo. Ap. 189, the Kansas City Court of Appeals refused to follow *Clafin v. Clafin*, and declared the opposite view "to be supported not only by a greater weight of authority, but also by that of sounder reason;" p. 197. See *Tarrant v. Backus*, 63 Conn. 277, 284, 285; *Avery v. Avery*, 90 Ky. 613; and § 121 *j*, *post*.

§ 121 *f*. It would seem that one of two courses could be taken. We have a proviso for postponement of possession to which (on the assumption that *Claflin v. Claflin* is law) the only objection is that the proviso is too remote. Now, we may say —

First. That the proviso is void as introducing a remote modification and is to be rejected. The son will then be entitled to immediate possession of the property. This is the mode in which the English equity courts have treated the analogous case of clauses against anticipation attached to a married woman's estate.¹

Second. That the proviso does not violate the Rule against Perpetuities; that the Rule is concerned only with the *beginning* of interests; that as the son's interest vests within the prescribed limits the Rule is satisfied and has nothing more to do with the matter; but that then another question arises, with which the Rule against Perpetuities has nothing to do, viz.: Can the possession of a vested interest be postponed? *Ex hypothesi* it can, and therefore the proviso is good. In other words: The Rule against Perpetuities settles the time within which interests must vest; but, when once vested, they are all, present and future alike, subject to the same restraints against alienation, and with this the Rule against Perpetuities has nothing to do.² This is the view which Jessel, M. R., thought correct, though his language was not always the clearest, and though he felt bound by the earlier cases to decide against his judgment. It is respectfully submitted that this is the correct view, and that the other theory is one more instance of the confusion wrought by confounding the Rule against Perpetuities with the rules against restraints on alienation.³

§ 121 *g*. Now let us turn again to the case imagined in § 121 *b*, *ante*, — a legacy to the children of A. to be paid them when they reach twenty-five, and suppose it made in Massa-

¹ See §§ 432 *et seq.*, *post*.

389, 402. See 4 Ill. Law Rev. 281,

² This is quoted with approval in *Armstrong v. Barber*, 239 Ill.

282.

³ See §§ 436–437 *b*, 442, *post*.

chusetts or Illinois, where the doctrine of *Claflin v. Claflin* prevails; and let us (I) further suppose that at the testator's death no child of A. has reached the age of four years. If the first method of dealing with the case suggested in the preceding section is adopted, then the postponing proviso will be rejected, and the children of A. born after the testator's death excluded. But if the second and, as it is submitted, the true theory is adopted, then the proviso is retained. Does that let in the after-born children? It would seem not. By letting in after-born children, the number and size of the shares may be determined at too remote a period and, therefore, as shown in § 121 *b*, *ante*, the construction which limits the class to those children born at the testator's death will not be altered. At the same time, as is contended in the preceding section, the doctrine of *Claflin v. Claflin* will preserve the proviso for postponement as to the members of the class so limited. But suppose (II) that at the testator's death there is at least one child four years old or over, then by either method the postponing provision will be retained, as all the children born before the eldest reaches, or would, if living, have reached, twenty-five, will take. By the first method the postponement will cease as to the shares of all children of A.'s not four years old at the testator's death, while, by the second method, it will be good as to all the children who take.

§ 121 *h*. Suppose, again, that a devise takes this form. Property is given to A. and his heirs on trust to pay the income to B. and his heirs, with a proviso that the trust is not to be determined until A. wishes it. Apparently the Massachusetts court would apply the doctrine of *Claflin v. Claflin* and would refuse to compel the trustee to convey against his will.¹ But how if it is provided that the trust shall not be terminated until A. or his heirs wish it, or until some other possibly remote contingency happens?

§ 121 *i*. The fact is that the Massachusetts court in *Claflin*

¹ See *Young v. Snow*, 167 Mass. 467; *Hale v. Herring*, 208 Mass. 287; *Danahy v. Noonan*, 176 Mass. 319.

v. *Clafin* introduced a novel idea into the law, that of the inalienability of absolute interests, just as the Court of King's Bench in *Pells v. Brown*¹ introduced a novel idea into the law, that of the indestructibility of future interests.² And as the Rule against Perpetuities had to be invented to control the indestructible future interests created by *Pells v. Brown*, so some rule must be invented to control the inalienable interests created by *Clafin v. Clafin*. It is perhaps likely that the same period as that prescribed by the Rule against Perpetuities will be taken,³ although it would seem quite open to the Court to adopt some other period, if found more convenient.⁴

§ 121 *i i*. In calculating the period are we to begin from the testator's death, or from the beginning of the future interest? Professor Kales⁵ thinks we should begin with the testator's death. Following the analogy of restraints on anticipation of

¹ Cro. Jac. 590 (1620).

² It is worth while in this connection to note the remarks of Treby, C. J., in *Scattergood v. Edge*, 12 Mod. 278, 287: "These executory devises had not been long countenanced when the judges repented them; and if it were to be done again, it would never prevail," and the more picturesque language of Powell, J., in the same case (p. 281), that the notion that an executory devise was not barred by a recovery "went down with the judges like chopped hay."

³ The question arose and was argued in *Wirth v. Wirth*, 183 Mass. 527, but the case went off on another point, the Court "not intimating any opinion upon any other of the matters in dispute." See *Winsor v. Mills*, 157 Mass. 362, 364, where Knowlton, J., says, — "Where such a restraint [on alienation of a fee simple] is held permissible for a limited time, it would be deemed unreasonable

and contrary to the policy of the law to allow it to continue beyond the period fixed by the rule against perpetuities."

⁴ See *Armstrong v. Barber*, 239 Ill. 389, 403. In *Southard v. Southard*, 210 Mass. 347, a trust was created in 1856 to continue until certain mortgages were paid out of accumulated income. In 1910 the Court ordered the trust terminated. They said: "The inhibition from making any conveyance of an estate in fee simple until the mortgages had been previously satisfied from income rendered the property inalienable for an unreasonable period and the trust should be terminated." Nothing was said as to what was a reasonable period, or about any analogy to the Rule against Perpetuities. Cf. an able article by Mr. G. L. Clark, 10 Mich. Law Rev. 31, 37 *et seq.*

⁵ 19 Harv. Law Rev. 604, note; 20 Harv. Law Rev. 202.

future interests of married women:—if we adopt the present doctrine of the English courts, this may be right; but if we adopt the view of Jessel, M. R., which, it is submitted, is correct, we should start from the beginning of the future estate. If the latter view is sound, then every postponement of enjoyment confined to the life of the first taker of a vested interest would be good.

§ 121 *j*. Another local doctrine, of a similar, though not identical, character, should be remarked upon. In Kentucky, a proviso attached to a conveyance in fee simple, restraining the grantee for a limited time from alienation, is valid.¹ The Kentucky Compiled Statutes (1894), § 2360, reads, — “The absolute power of alienation shall not be suspended, by any limitation or condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter.” In *Johnson v. Johnson*² a testatrix devised property to a trustee to apply the income to the use of her son and his family during his life, and on his death the income to be held for the use and benefit of the son’s children, until the youngest reached twenty-five, and then to be equally divided between them. It was held that on the son’s death the children were entitled to have the property distributed among them.

¹ See Gray, *Restraints on Alienation* (2d ed.), §§ 53, 55; and besides the cases there cited, *Smith v. Isaacs*, 78 S. W. Rep. (Ky.) 434. See § 737, *post*.

The cases in the Dominion of Canada holding a like doctrine (for which see Gray, *loc. cit.*, and also *Chisholm v. London & Western Trusts Co.*, 28 Ont. 347) have been overruled by the Supreme Court of Canada in *Blackburn v. McCallum*, 33 Can. S. C. 65. Cf. 16 Can. Law Times, 1; 17 Can. Law Times, 105.

In *Feit v. Richards*, 64 N. J. Eq. 16, *Magie, C.*, expresses, *obiter*, his inclination to agree with the *dictum* of Jessel, M. R., in *In re Macleay*, 20 Eq. 186, that a restraint on the alienation of a fee limited in time may be good. But the contrary has now been expressly ruled in England. *In re Rosher*, 26 Ch. D. 801. Cf. *Rackemann v. Riverbank Improvement Co.*, 167 Mass. 1; *Fowler v. Duhme*, 143 Ind. 248; *Atwater v. Russell*, 49 Minn. 22, 57.

² 79 S. W. Rep. (Ky.) 293.

CHAPTER V.

ORIGIN AND HISTORY OF THE RULE AGAINST
PERPETUITIES.1. *No Question of Remoteness in Early Times. — Possibility on a Possibility.*

§ 123. BEFORE the enactment of the Statute of Uses ¹ (1535) and the Statute of Wills ² (1540), no question of remoteness in the creation of estates and interests seems to have come before the courts. It is true that freehold estates could not be granted *in futuro* except by way of remainder; but this arose from the necessity of livery, not from any idea of remoteness. It is also true that existing incorporeal hereditaments, e. g. reversions, rents, etc., could not be granted *in futuro*; but this again was not on the score of remoteness.³ And to the interests which could be created *in futuro*, such as rents, chattels real, uses in equity, we never hear of an objection that they were too remote.⁴

§ 124. There was a mode before the Statutes of Uses and Wills in which a freehold estate could be created *in futuro*. By the custom of gavelkind, and by the customs in many localities, e. g. in London, land was devisable. Land passed under a will without livery, and it was repeatedly held that a power to executors to sell the testator's land was good; that until the sale the land was in the heir or devisee; but that upon the execution of the power the estate passed to the vendee, by virtue of the will, without livery, and even with-

¹ St. 27 Hen. VIII. c. 10.

² St. 32 Hen. VIII. c. 1.

³ See § 17, *ante*.

⁴ See *Everwike v. Prior of Brid-*

lington, 22 Edw. III. 19; Fitz. Ab. Condi. 11, 12; 10 Hen. VII. 12; Lewis, Perp. c. 29.

out a deed, from the executors.¹ The right of the executors to thus create an estate, when they had no estate themselves, was felt to be a singular one;² but no objection appears to have been made on the score of remoteness, although the will sometimes provided that the sale should be made by the executors, and, should they all die, then by the executors of the executors.³ So in *Farington v. Darrel*,⁴ Martin, J., says: "It has been adjudged that if one devises that his executor or the executor of his executor may sell his land, and at the time of this devise the executors of the executor were not *in rerum natura*, yet their sale has been held good and sufficient." To which Paston, J., replies: "That may well be; for they were *in esse* at the time that the first executors died."⁵

§ 125. It has been a common notion that to a certain extent remoteness of limitation was prevented in the early times by means of a supposed rule that no future interest could be limited to the unborn child of an unborn person, because such a limitation would be a possibility upon a possibility.⁶ But

¹ Lit. §§ 169, 585, 586. 19 Hen. VI. 23. Co. Lit. 113 *a*.

² Babington, C. J., in *Farington v. Darrel*, 9 Hen. VI. 23, 24, says: "Est merveilleux Ley de raison: mes ceo est le nature d'un devis, et devise ad este use tout temps en tiel forme; et issint on aura loyalment franktenement de cesty qui n'avoit rien, et en mesne le maniere come on aura *fire from flint*, et uncore nul *fire* est deins le *flint*: et ceo est pour performer le darrein volonte de le devisor." s. c. 11 Hen. VI. 12, 13. So 19 Hen. VI. 24 *b*.

³ *Rex v. Croyden* (Gowdchep's Case), 49 Edw. III. 16.

⁴ 9 Hen. VI. 23, 24.

⁵ See 38 Ass. pl. 3; 2 Harg. Jurid. Arg. 28, 29. Such a power would now be held too remote. "Supposing the second executor not to have been born at the tes-

tator's death, the estate to arise under an execution of the power might by possibility not take effect until the expiration of fifty years or more after the decease of the first executor, the life in being." 1 Chance, Pow. § 307. It does not appear that executory devises raised in any other way than by powers given to executors were ever held valid. Thus in the Prior of St. Bartholomew's Case, Dyer, 33 *a*, which was determined in 1537, before the Statute of Wills, it was held by the Court of Common Pleas that a shifting executory devise, on breach of condition by the first devisee, was bad, because the heir only could enter for breach of condition. The land was devisable by custom. See Lewis, Perp. 77, 78.

⁶ Mr. Charles Sweet in 15 Law Quart. Rev. 71; 29 Law Quart.

the idea that there cannot be a possibility on a possibility seems to have been a conceit invented by Chief Justice Popham.¹ The idea is expressed in different forms. Thus, it is said, a lease could not "commence upon a contingent which depended upon another contingent."² "A possibility which shall make a remainder good, ought to be a common possibility and *potentia propinqua*."³ "A possibility cannot increase upon a possibility."⁴ "Sometimes one possibility shall not beget another."⁵ "The law will never intend a possibility upon a possibility."⁶ But in none of these shapes does it meet with any countenance in the earlier cases.⁷

§ 126. The authorities referred to for this doctrine in the places above cited are as follows: 12 Ass. pl. 5. A. let land to B. on condition that if A. or his heirs paid B. or his heirs ten pounds within a certain time, it should be lawful for them to re-enter; and if they did not pay within the term, and B. paid A. ten pounds on a certain subsequent day, that then B. should have the fee "*sans plus en la condition*." Neither A. nor B. paid. A. entered after both times (*apres l'un terme et l'autre*), and B. ousted him. A. brought an assise, but took nothing by his writ. There is only a short note of the case. It would seem that A. failed because the condition did not provide that, on failure to pay by B., A. might enter. Whatever the ground of the decision, there is not the slightest

Rev. 304; 1 Jarm. Wills (6th ed.) 287 note (*h*); 12 Columbia Law Rev. 199; while utterly condemning the notion that a limitation of a possibility upon a possibility is void, yet maintains that the rule in question existed, based on another reason. This matter is discussed, §§ 191-199, 287 *et seq.*; App. K, §§ 931 *et seq.*, *post*.

¹ Rector of Chedington's Case, 1 Co. 153 *a*, 156 *b*. Cholmley's Case, 2 Co. 50 *a*, 51 *a*. Stafford's Case, 8 Co. 73 *b*, 75 *a*. Lampet's Case, 10 Co. 46 *b*, 50 *b*. Blamford

v. Blamford, 3 Bulst. 98, 108. Co. Lit. 184 *a*. "If anyone turns to the passage in Coke upon Littleton where it is discussed, I hope he will understand it better than I do. I confess I do not understand it now, and never did." *Per* Lindley, L. J., in *Whitby v. Mitchell*, 44 Ch. D. 85, 92.

² 1 Co. 156 *b*.

³ 2 Co. 51 *a*.

⁴ 8 Co. 75 *a*.

⁵ 3 Bulst. 108.

⁶ Co. Lit. 184 *a*.

⁷ See *Wms. Real Prop.* (22d ed.) 370, 371.

reason to suppose it to have been that a contingent "depended upon another contingent." ¹

§ 127. *William v. Florence.*² Osbern and Florence his wife levied a fine of land, and the conusee conveyed the land to Osbern and Florence for life, remainder to Geoffrey the son of Osbern in tail, remainder to Austin the brother of Geoffrey in tail, remainder to the heirs of Osbern. In an action against Florence, after the death of her husband, for possession of the land, she made default; and then came one John, saying that Florence had only a life estate, that Geoffrey and Austin had both died without issue, and that he was entitled after the death of Florence as the heir of Osbern, and praying that he might be allowed to come in and defend. The demandant replied that Geoffrey the son of Osbern was alive, and Austin his brother. Ash, of counsel for John, said: "Your plea is not properly pleaded, if you do not say that Geoffrey to whom the remainder was limited is alive." To which Pole, for the demandant, replied: "You have simply alleged that the remainder was given in tail to Geoffrey the son of Osbern and Austin his brother, and that they are dead, and to that we say that Geoffrey the son of Osbern is alive, and Austin, and it is enough for me to traverse what you have said in the same words as you have used to me." The counsel for John rejoined: "I acknowledge that Geoffrey the son of Osbern is alive and Austin his brother also, but I say that their being so ought not to oust me, for I say that they were not born at the time of the fine levied, but were born long time after the fine." Pole then said: "You have acknowledged that they are alive who bear the same name and surname as those to whom you have said the remainder was given, and before by your plea you made no mention of them." To which John's counsel rejoined: "By our plea we have not undertaken to plead of any others than those to whom the remainder was given in tail, and that cannot be to others than those who were alive at the time of levying the fine, but as to your pleas of the others, that by their being

¹ 1 Co. 156 b.

² 10 Edw. III. 45.

alive I shall not be received, now for the time it is enough for me to say that their being alive does not oust me from being received." The reporter adds: "And afterwards he was received." The fact seems to be that the land was conveyed, after the life estates, in remainder to two persons — Geoffrey and his brother Austin — who were then living. A limitation to two persons, one of the name of Geoffrey and the other his brother of the name of Austin, neither of whom had been born, might suggest itself as a hypothetical case to a lawyer of the sixteenth century, but it is inconceivable that a baron of the fourteenth should ever have actually settled his estate in that fashion. This Geoffrey and Austin died, and another Geoffrey and Austin were born, very likely of the same parents; but these latter could not be the persons for whom the remainder was intended, for they were not even born when it was created.¹

§ 128. In 18 Edw. III. 39, pl. 34, an estate was given to a man and his sister and the heirs of their bodies; in 24 Edw. III. 29, pl. 17, an estate was given to two men and their wives and the heirs of their bodies; in 44 Edw. III., Fitz. Ab. Taile, pl. 13, an estate was given to brothers and a sister and the heirs of their bodies; and in 7 Hen. IV. 16, pl. 9, the case was put of a devise to two men, or to a man and his mother, or to a man and his daughter, and the heirs of their bodies; and in all these cases it was held that the grantees had separate inheritances, because, as the reason is given in the last case, the will of the donor should be preserved, — there is nothing about a possibility on a possibility.²

¹ See *Cholmley's Case*, 2 Co. 50 a, 51 b; *Wms. Real Prop.* (22d ed.) 370, 371. Perhaps no second Geoffrey and Austin were really born and the question raised may have been one of pleading. John's objection is that the demandant's pleading is improper because it does not allege that the Geoffrey

and Austin to whom the remainder was limited are alive, and though there be a Geoffrey and Austin alive as alleged, they may not be the Geoffrey and Austin to whom the remainder was limited, and for the failure to allege that they are, John says the pleading is bad.

² Co. Lit. 184 a.

§ 129. In *Farington v. Darrel*,¹ Babington, C. J., to illustrate the position that the validity of a devise must be determined at the death of the testator, says that if a devise is made to chantery or college, and there is no such chantery or college, the devise is void, though a chantery or college of that name be afterwards founded. Here the gift purports to be to an existing corporation; if there is no such corporation the gift fails; and of course it cannot be claimed by a subsequently established corporation, not because there could not be a gift to such a corporation, but because it was not, in fact, the corporation for which the gift was intended.²

§ 130. 2 Hen. VII. 13. The passage referred to here is a remark of Serjeant Keble. He says: "The remainder to the right heirs of J. at S. is good, because it can be a good remainder by common intendment; but if the King grants to an abbey, and there is none such, the grant is void notwithstanding that it is made afterwards. And in the case of the heirs of J. at S., suppose when the remainder is created that there is no J. at S., and afterwards a J. at S. is born, it [the remainder] is void, notwithstanding J. at S. dies and has heirs at the time of the remainder." This remark of Serjeant Keble lends no aid to the notion of the invalidity of a possibility upon a possibility. If the remainder, instead of being to the heirs of J. at S., had been to J. at S. himself, and there was no such person as J. at S. alive, the learned Serjeant would have considered the remainder just as invalid; this is clear from the case he puts of the abbey. He means that a gift to a person *tanquam in esse* will not take effect if there is no such person living, for there is no one answering the description of the donee.³

§ 131. In *Lane v. Cowper* ⁴ (1575), Wray, Chief Justice of the Queen's Bench, and Gawdy, J., "took the diversity, to

¹ 9 Hen. VI. 23, 24.

Southwood, 1 Roll. R. 253, 254.

² 1 Prest. Abs. 128. See *Corpus Christi College Case*, 4 Leon. 223.

1 Prest. Abs. 128.

⁴ Moore, 103, 104.

³ *Per* Lord Coke in *Simpson v.*

wit, that a person not *in esse* at the beginning can take a remainder by purchase, if he is *in esse* before the end of the particular estate, so that the limitation of the remainder is in general words, as 'to the right heirs of J. S.,' or 'to him who shall first come to St. Pauls,' 'to the wife that shall be,' and the like. But if the limitation be in special words, as to 'Jane, the first wife of J. S.,' where he has no wife at the time, or to 'the Mayor and Commonalty at Islington,' where there is none such at this time, then although before the end of the particular estate J. S. takes one Jane to wife, or Islington is incorporated by the name of the Mayor and Commonalty, yet they will not take the remainder." Here again the gift is void, because made to persons or corporations *tanquam in esse* who are not *in esse*.¹

§ 132. The above §§ 126-131 contain all the cases referred to as authorities for the theory that a possibility upon a possibility is invalid, but *Manning v. Andrews* ² (1576) also deserves attention. In that case there was a feoffment before the Statute of Uses to the use of W. and his wife J. for their lives, and after their death to the use of the heir of the bodies of W. and J. for life, then to the use of the heir of the same heir, and in default of such issue to the use of the heirs of the body of W. and J. for the life or lives of every such heir or heirs, and, for default of such heirs, to the heirs of the body of W., and in default, etc., to the heirs of W. Condition, that if "any of the said heirs" should attempt to alienate his interest, the use limited to such heir should be void during his life, and the feoffees should be seised to the use of the heir apparent of the offender. After the feoffment W. had issue T. and died. T. had issue F. and P. After the Statute of Uses, T., and afterwards F., levied a fine to the defendant. The feoffees entered to revive the use to P., who was F.'s heir apparent, and then P. entered. Jeffrey, J., thought that

¹ See Jeffrey, Serj., *arguendo*, in 91; Brent v. Gilbert, Dal. 111, Mutton's Case, 2 Leon. 223; Dal. 112.

² 1 Leon. 256.

an entry by the feoffees was necessary, and that they were debarred from entering by the fine. Wray, C. J., and Southcote, J., agreed that no entry by the feoffees was necessary; but the Chief Justice seems to have thought that P. was debarred from entry by the fine. Southcote, J., held that P.'s entry was effectual to vest the estate in him; and neither of the other judges seems to have had any doubt that the shifting use over on alienation was valid, — they differed only on the effect of the fine.¹ The case is important as showing that the notion of the impossibility of limiting an estate to the issue of an unborn person had no existence at that time.

§ 132 *a*. The existence of a rule at common law, that after an estate for life to an unborn child a remainder to such child's children is void, has been of late so positively asserted that it is worth while to quote the language of the judges in *Manning v. Andrews*, to show that no such rule was known to them. Gawdy, J., said "that every issue begotten betwixt William and Joan should have an estate for life successive, and a remainder in tail expectant as right heir of the body of William, and this estate tail shall not be executed in possession by reason of the mesne remainder for life limited to the heir of the body of William and Joan, and although that these mesne remainders are but upon a contingent, and not *in esse*, yet such regard shall be had to them, that they shall hinder the execution of the estates for life, and in tail in possession." Wray, C. J., said: "If a devise be made to one for life, and then to his heir for life, and so from heir to heir *in perpetuam* for life, here are two estates for life, and the other devisees have fee, for estates for life cannot be limited by general words from heir to heir, but by special words they may."

§ 133. Lord Coke has admitted that as a general proposition the statement that there cannot be a possibility upon a possibility is bad law. "Coke moves another matter in this

¹ See 1 Sugd. Pow. (7th ed.) *post*. See 15 Law Quart. Rev. 15, 16. Cf. also *Wood v. Sanders*, 73, note.
1 Ch. Cas. 131; Pollexf. 35; § 161,

case on Popham's opinion, Co. 1, Rector de Chedington, that a possibility on a possibility is not good, for here in our case is a possibility on a possibility . . . yet it seems that it is good, for if Popham's opinion should be law, it would shake the common assurances of the land . . . but I agree that in divers cases there shall not be possibility upon a possibility, and he puts the diversities put in *Lampet's Case*, 10 Co. 50 b." ¹

§ 134. The true reason why before the time of the Statutes of Uses and Wills no objection of remoteness appears to have been made to any limitations is, that in fact no need of any such restriction on the creation of future estates was felt. Incorporeal hereditaments would seldom be created to begin *in*

¹ See *Blamford v. Blamford*, 3 Bulst. 98, 108, better reported in 1 Roll. R. 318, 321.

As the notion of a possibility on a possibility had no roots in the law, so it flourished but a short time. In 1681, Lord Chancellor Nottingham, in the great Case of the Duke of Norfolk, said "that there may be a possibility upon a possibility and that there may be a contingency upon a contingency is neither unnatural or absurd in itself; but the contrary rule given as a reason by my Lord Popham in the Rector of Chedington's Case, 1 Co. 156 b, looks like a reason of art; but in truth has no kind of reason in it, and I have known that rule often denied in Westminster Hall." 3 Ch. Cas. 29. See *Mayor of London v. Alford*, Cro. Car. 576, 577; *Love v. Windham*, 1 Sid. 450, 451; *Thellusson v. Woodford*, 4 Ves. 227, 327.

On the revival of the doctrine as the parent of the alleged rule that, at common law, a remainder to the child of an unborn person could not be limited after

a remainder for life to its father, see §§ 191 *et seq.*, *post*.

Except as the doubtful parent of the alleged rule that life estates cannot be limited to successive generations, no one can now be found to defend it. *Fearne*, C. R. 251, Butler's note. *Cole v. Sewell*, 4 Dr. & W. 1, 32. *Egerton v. Brownlow*, 4 H. L. C. 1, 54. *Re Ashforth*, [1905] 1 Ch. 535, 543. Third Real Prop. Comm. Rep. 29. 1 Prest. Abs. 128. 1 Leake, Land Law, 335. Sugd. Pow. (8th ed.) 393, 394. Wms. Real Prop. (22d ed.) 370, 371. 3 Enc. Laws of Eng. (2d ed.) 518. *Whitby v. Mitchell*, 42 Ch. D. 494; 44 Ch. D. (C. A.) 85. *In re Frost*, 43 Ch. D. 246. 6 Law Quart. Rev. 410, 424. 14 Law Quart. Rev. 234. 25 Law Quart. Rev. 385, 393. Cf. Challis, Real Prop. (3d ed.) 118.

As to the later growth of the idea that future limitations of remainders are governed by this supposed rule, and as to the present condition of the law upon the subject, see §§ 284-298 *h*, *post*, which should be consulted here.

futuro. Terms for years were generally short, present interests. Executory devises under powers given to executors could arise only in those comparatively rare localities where land was devisable. Contingent remainders were probably for a long time unknown to the law.¹ It had been adjudged, however, before 1430 that a remainder to the heirs of a living person was good.² But contingent remainders, though allowed as legal, were seldom employed, even after the Statute of Uses. Mr. Joshua Williams says that in all marriage settlements prior to the reign of Queen Mary, who came to the throne in 1553, "the remainders appear to be uniformly vested, the estates tail being given to living parties, and not to sons or daughters unborn."³ From *Chudleigh's Case*⁴ it appears that in 1556 a feoffment was made to uses giving estates tail to the successive (unborn) children of living persons, substantially in the form of a modern English settlement; and 1556 is also the date of the earliest settlement traced by Mr. Williams in which contingent remainders to unborn persons occur.⁵ Even had contingent remainders been more frequent, the ease with which the tenant for life could, by feoffment, fine, or recovery, destroy the particular estate necessary to support a contingent remainder would have prevented their becoming practically inconvenient, however remote.⁶

2. Introduction of Conditional Limitations.

§ 135. As has been shown,⁷ executory devises had long been recognized as possible in localities where lands were devisable,

¹ § 100, *ante*.

² Anon., cited in *Farington v. Darrel*, 9 Hen. VI. 23, 24. 32 Hen. VI. Fitz. Ab. Feoff. & Faits, pl. 99.

³ 1 Jurid. Soc. Papers, 47.

⁴ 1 Co. 120 *a*.

⁵ 1 Jurid. Soc. Papers, 47.

⁶ Williams on Seisin, 190, 191. See Mr. Cyprian Williams's conjecture, 3 Enc. Laws of Eng. (2d

ed.) 518, 519, that originally no remainders to uncertain persons were allowed, and that when they were introduced, they were confined to remainders after a vested estate of freehold. And see the same author's article, 14 Law Quart. Rev. 234, 238. On any objection to the remoteness of rights of entry on common-law conditions, see §§ 299 *et seq.*, *post*.

⁷ § 124, *ante*.

but it was not until after the passage of the Statutes of Uses (1535) and of Wills (1540) that contingent future limitations of freeholds, other than remainders, became valid generally.

§ 136. Springing uses seem to have been first recognized in *Anon.*¹ (1538), where a covenant to stand seised to the use of B. on the performance of an act by B. was held to raise the use on the happening of the contingency.²

§ 137. In *Anon.*³ (1552) there was a feoffment to the use of W. and his heirs until A. paid a sum of money, and then to A. and his heirs.⁴ It was assumed by all that this was a good shifting use.⁵

¹ Bro. Ab. Feoff. al Uses, 340, pl. 50.

² See Gilb. Uses (Sugd. ed.) 164, note. So Wood's Case, in the Court of Wards (1560), cited 1 Co. 99 a; and see Mutton's Case, Dyer, 274 b; 2 Leon. 223; Dal. 91; Moore, 96, 376; 1 And. 42 (1573); Woodliff v. Drury, Cro. El. 439; *sub nom.* Woodlet v. Drury, 2 Roll. Ab. 791, pl. 1 (1595); Mills v. Parsons, Moore, 547 (1595); Blackbourn v. Lassels, Cro. El. 800 (1600); Wood v. Reignold, Cro. El. 764, 854 (1601); Lewis, Perp. 57, 58.

³ Bro. Ab. Feoff. al Uses, 339, pl. 30.

⁴ The question discussed was whether the estate could vest in A. without an entry on the part of the feoffees to uses. This point was often afterwards mooted. See Brent's Case, 2 Leon. 14; Dyer, 340 a; Manning v. Andrews, 1 Leon. 256; Chudleigh's Case, 1 Co. 120 a; 1 And. 309; Pop. 70; Jenk. 276; and the other cases cited 1 Sugd. Pow. (7th ed.) 10-39. It is now generally conceded that no entry by the feoffees is necessary. The matter does not concern us here.

⁵ See Brent v. Gilbert, Dal. 111 (1574); Brent's Case, 2 Leon. 14; Dyer, 340 a (1575); Manning v. Andrews, 1 Leon. 256 (1576); Bracebridge's Case, 1 Leon. 264; *sub nom.* Harwell v. Lucas, Moore, 99 (1578); Stonley v. Bracebridge, 1 Leon. 5 (1583); Smith v. Warren, Cro. El. 688 (1599); Anon., Moore, 608; Anon., 13 Co. 48 (1609); s. c., *semble*, Jenk. 328; Sympton v. Sothern, Cro. Jac. 376; 2 Bulst. 272; *sub nom.* Simpson's Case, Godb. 264; *sub nom.* Simpson v. Southwood, 1 Roll. R. 109, 137, 253 (1615); Allen's Case, Ley, 55 (1617); Lewis, Perp. 58-60.

Bostock's Case, Ley, 54 (1616). In the Court of Wards. Fine to the use of Edward Bostock for life, remainder to the use of his heirs male on the body of his wife Margery begotten, with remainders over. "And if the said Edward should fortune to die (living the said Margery), that then the said fine should be . . . to the use of the said Margery, for term of life, and after her decease to the uses aforesaid." Edward Bostock died, leaving Margery his widow, and an infant son. Held, by Coke, C.

§ 138. In *Anon.*¹ (1555) and *Wilford v. Wilford*² (1555) there were executory devises, but in neither case does their validity appear to have been drawn in question.³ In *Oclie's Case*⁴ (1567) the validity of an executory devise is said to have been decided. Later cases in which executory devises were recognized as valid are given in the note.⁵

§ 139. No question as to the remoteness of a conditional limitation of a freehold estate in freehold or copyhold land, either by way or use of devise, appears to have ever come before the courts until *Snow v. Cutler*⁶ in 1664. The doctrine of remoteness was brought to the attention of the courts in other ways. In most of the cases of conditional limitations they were not in fact such as are forbidden by the modern Rule against Perpetuities, but in *Manning v. Andrews*⁷ the limitation was what would now be considered too remote.

J., Hobart, C. J., and Tanfield, C. B., that the King was not entitled to wardship or marriage of the son during the life of Margery. Mr. Lewis, Perp. 150, 151, speaks of this case as "a clear adjudication of the validity of a shifting use." But the use to Margery, though somewhat inartificially expressed, was not a shifting use at all, but simply an ordinary vested remainder for life, limited by way of use. Such evidently was the opinion of the Court. They say, "The estate of Margery is an immediate estate for life."

¹ Dyer, 124 a. This case seems to be the same as *Hinde v. Lyon*, reported 2 Leon. 11; 3 Leon. 64, 70, as having been decided in 1578. See Challis, Real Prop. (3d ed.) 170.

² Dyer, 128 a.

³ See also Boulton's Case (1564), cited by counsel from Egerton's Reports in *Pells v. Brown*, 2 Roll. R. 216, 217; Palm. 131, 132.

⁴ Cited in *Pells v. Brown*, 2 Roll. R. 216, 220.

⁵ Wellock v. Hammond, Cro. El. 204; 2 Leon. 114 (1590) (see Boraston's Case, 3 Co. 19 a, 20 b). *Hoe v. Garrell* (1591), cited in *Pells v. Brown*, 2 Roll. R. 216, 220; Palm. 131, 136. *Fulmerston v. Steward* (1596), cited in *Pells v. Brown*, Cro. Jac. 590, 592; Palm. 131, 135; 2 Roll. R. 216, 218. *Purslow v. Parker*, 2 Roll. Ab. 253, pl. 2; Id. 793, pl. 2 (1600); cited *sub nom.* *Pinsloe v. Parker*, 2 Roll. R. 218, 219; *su nom.* *Mullineux's Case*, in Palm. 136. *Pay's Case*, Cro. El. 878; *sub nom.* *Payne v. Ferrall*, Noy, 43 (1602). See *Lewis*, Perp. 80, 81.

⁶ 1 Lev. 135; 1 Keb. 752, 800, 851; 2 Keb. 11, 145, 296; T. Raym. 162; *sub nom.* *Snow v. Tucker*, 1 Sid. 153; § 165, *post*.

⁷ 1 Leon. 256, stated in §§ 132, 132 a, *ante*.

Perhaps this was also the case with *Fulmerston v. Steward*.¹ In *Pay's Case*² there was a devise to A. from Michaelmas following the testator's death for five years, and then to B. and his heirs. It was held by all the judges of the Court of Queen's Bench, without argument, that the springing executory devise (or remainder, as it was called) to B. was good. It will be observed that this executory devise might possibly not have vested in B. and his heirs within the life of any person living at the death of the testator, although it must have vested at Michaelmas following the testator's death.³

3. *Meaning of "Perpetuity."*

§ 140. Estates in fee simple were at one time to a considerable extent inalienable, but the Statute *Quia Emptores*, 18 Edw. I. c. 1 (1289), enabled tenants in fee simple to alienate their land at pleasure; and provisions expressly introduced into conveyances for the purpose of restraining alienation were held invalid.

§ 141. The Statute *De Donis*, Westm. I. 13 Edw. I. c. 1 (1285), which created estates tail, enacted that they could not

¹ Cited in *Pells v. Brown*, Cro. Jac. 590, 592; Palm. 131, 135; 2 Roll. R. 216, 218. The doubt as to *Fulmerston v. Steward* arises from the lack of agreement in the reports. As stated by Croke, Sir Richard Fulmerston devised to Sir Edward Cleere and his wife, and the heirs of Sir Edward, certain lands in Elden, "upon condition they should assure lands in such places to his executors and their heirs to perform his will; and if he (*sic*) failed, then he devised the said lands in Elden to his executors and their heirs." The limitation to the executors was held a good executory devise. Palmer states the devise as being "sur condition

que Cleere faiera divers acts, et sur condition que si Cleere ou his heirs ne perform le condition, que son estate cessera, et les executors averont le terre, et ceo convey al ascun de son nosme." Rolle gives the devise to Sir Edward and his heirs, as on condition "that if he does not perform," etc. If the condition was one that the heirs of Sir Edward could perform (which is doubtful on the reports), the limitation over would now be considered too remote. If, on the other hand, it was to be performed, if at all, in his lifetime, it would be valid.

² Cro. El. 878; *sub nom.* *Payne v. Ferrall*, Noy, 43.

³ See § 176 *et seq.*, *post*.

be barred by fine, but in *Taltarum's Case*, 12 Edw. IV. 19, pl. 25 (1472), the judges, who, for some reason or other, were always favorable to the transfer of land, held that estates tail could be barred by a recovery; and at last, by the Statutes of Fines, 4 Hen. VII. c. 24 (1489) and 32 Hen. VIII. c. 36 (1540), the same effect was allowed to fines levied with certain formalities.

§ 141 *a*. As early at least as the fifteenth century, it was settled that alienation of a fee simple could not be restrained indirectly by means of a condition or limitation any more than it could be directly.¹ But in an estate tail a condition that the tenant should not make a feoffment, or a clause of cesser upon his making a feoffment, was good. As, however, not only would an estate tail be barred, but all conditions and limitations annexed to it would be destroyed by a common recovery or by a fine under the Statute, they became practically valueless unless a tenant in tail could be restrained from suffering a recovery or levying a fine. This could not be done directly, but attempts began to be made towards the end of the sixteenth century to attach to an estate tail conditions against going about to levy a fine or suffer a recovery. These attempts were not successful.²

¹ Gray, *Restraints on Alienation* (2d ed.), § 19. And so it was said by Popham, C. J., in *Chudleigh's Case*, 1 Co. 120 *a*, 138 (1595). "If a feoffment be made to the use of A. for life, and after to the use of every person who should be his heir, one after another, for the term of the life of every such heir only; in this case if this limitation should be good, the inheritance would be in nobody; but this limitation is merely void, for the limitation of an use to have a perpetual freehold is not agreeable with the rule of law in estates in possession." Whether this *dictum* is law, and whether it means that

A. takes a fee, or that A. takes a life estate, and his heir a remainder in fee (which, by the Rule in *Shelley's Case*, would give A. the fee); or that A. took a life estate and his heir a life estate with resulting use in remainder to the feoffor in fee are matters which will be dealt with, in the discussion of the question whether the validity of a remainder to an unborn child and the invalidity of a following remainder to its child depends upon the Rule against Perpetuities or upon some independent rule. See §§ 298 *et seq.*, App. K, § 937.

² Gray, *Restraints on Alienation*, §§ 75-77.

§ 141 *b*. In the Essay on the Use of the Law (commonly but perhaps wrongly attributed to Lord Bacon), published in 1629, it is said: "There is started up a device called perpetuity; which is an entail with an addition of a proviso conditional tied to his estates, not to put away the land from the next heir; and, if he do, to forfeit his own estate. Which perpetuities, if they should stand, would bring in all the former inconveniences of entails that were cut off by the former mentioned statutes."¹

§ 141 *c*. Three of these cases came before the courts during the last few years of the sixteenth century: *Germin v. Ascot*,² *Cholmeley v. Humble*,³ in 1595, and *Corbet's Case*,⁴ in 1599. In the first two of these cases the condition was held invalid as "repugnant;" so it was in the last also, but here the word "perpetuities" occurs twice. The reporter says, "Divers matters were moved by the justices in their argument concerning the general case of perpetuities," and Glanville, J., said that "Richill, who was a judge in the time of Rich. II., and Thirning, who was chief justice of the Common Pleas in the time of Henry IV., intended to have made perpetuities, and, upon forfeiture of the estate tail of one of their sons, to have given the remainder and entry to another."⁵

§ 141 *d*. These attempts of a feoffor, donor, or testator, to prevent alienation for an indefinite period, having failed, it occurred to some ingenious person that it was perhaps possible to keep control over the ownership of property for a time by granting an estate for life with contingent remainders, for, as contingent remainders were not transferable, no alienation of the fee could take place until they vested. This device would not work at common law, because, although contingent remainders were not transferable, they were destructible⁶ by the life-tenant; but it was hoped that advantage might be taken

¹ 7 Bacon's Works (Spedding's ed.) 491.

² Moore, 364.

³ Id. 592.

⁴ 1 Co. 83 *b*.

⁵ See 1 Tiffany, Real Prop. § 152.

⁶ On the meaning of "destructible" when it is said that a contingent remainder is destructible, see § 101, note, *ante*.

of the Statute of Uses, and that contingent remainders limited by way of use would be held indestructible. This question was presented in *Chudleigh's Case*,¹ "commonly called the Case of Perpetuities," to all the judges, but they held that contingent remainders limited by way of use were as destructible as if limited at common law.

§ 141 *e*. In *Corbet's Case* and *Chudleigh's Case* the term "perpetuity" seems to have been used for the first time in our law, and it will be seen that there were two kinds of perpetuities: *First*, An estate tail with a condition or clause of cesser intended to prevent alienation. *Second*, A future contingent interest limited by way of use.

The Court quashed both these kinds of perpetuities, the first by declaring that the condition or clause of cesser was invalid, and the second by declaring that contingent interests limited by way of use were destructible.²

§ 141 *f*. The judgment as to the first kind of perpetuities has stood unshaken; it has always been law and is law to-day.³ But we shall see that the ingenuity of conveyancers, aided by the inadvertence of the judges, created a class of future interests which the courts held to be indestructible; that thereupon it became necessary to make a new rule for the restraint of indestructible future interests; and that this rule is the Rule against Perpetuities.⁴

4. *Conditional Limitations at first held destructible like Contingent Remainders.*

§ 142. No difference on the score of destructibility was at first felt to exist between remainders limited by way of use

¹ 1 Co. 120 *a*.

² See 1 Jarm. Wills (6th ed.) 281 *et seq.*; 15 Law Quart. Rev. 71; 12 Columbia Law Rev. 203; Scrutton, Land in Fetters, 123; 3 Enc. Laws of Eng. (2d ed.) 519; 11 Enc. Laws of Eng. (2d ed.) 66.

³ See Gray, Restraints on Alienation, § 77.

⁴ Cf. Mr. Williams's suggestive note to his article in 14 Law Quart. Rev. 234, 240.

On the difficulties arising from confounding these two kinds of perpetuities, see §§ 278 *et seq.*, *post*.

and conditional limitations. In *Brent v. Gilbert*¹ (1574) there was a feoffment to the use of A. and of such woman as should be his wife at his death, for their lives, with remainders over. A. levied a fine, married B., and died. The feoffees entered. It was held by the Court of Queen's Bench that the entry of the feoffees revived the use to B. In *Brent's Case*² (1575) the statement of facts was the same, except that the limitation was not to the use of A. and of such woman as should be his wife at his death, but to the use of A. and such woman as he shall marry, and except also that it appeared that A., before levying the fine, made a feoffment in which the feoffees joined. In the Common Pleas, Dyer, C. J., Manwood, and Monson, JJ. (Harper, J., dissenting) held that if the entry of the feoffees was necessary to revive the use, they were debarred from entry; and Dyer, C. J., and Manwood, J., thought such entry was necessary. There is no indication that the opinions of the judges would have been altered if B. had had a remainder instead of a shifting use. Indeed it is said that B. "shall take by way of remainder."³

§ 143. In *Woodliff v. Drury*,⁴ decided in 1595, not long after *Chudleigh's Case*, there was a feoffment to the use of the feoffor "and A. his *feme* that should be after their marriage, and of the heirs of their bodies," and the feoffor married A. It was held in the Queen's Bench that A. would take by this limitation of the use. All the justices said: "By the marriage the new use shall arise and vest, if there be no act in the meantime to destroy that future use (as it was in *Chudley's Case*)," thus showing that no distinction had then occurred to the Court between remainders limited by way of use and conditional limitations. They were supposed to be alike destructible.

§ 144. The first indication of the idea that a conditional limitation of a freehold interest was indestructible appears in

¹ Dal. 111.

² 2 Leon. 14; Dyer, 340 a.

³ 2 Leon. 16. See Dillon v.

Fraine, Pop. 70, 76; 1 Sugd. Pow. (7th ed.) 13-15; and cf. Hoe v.

Garrell (1591), cited in Pells v. Brown, 2 Roll. R. 216, 220; Palm. 131, 136.

⁴ Cro. El. 439; *sub nom.* Woodlet v. Drury, 2 Roll. Ab. 791, pl. 1.

*Smith v. Warren*¹ (1599). In that case a fine was levied to the use of the conusee and his heirs on condition that he would pay an annuity to the conusor, and on default of payment the land should be to the use of the conusor for his life, and one year over. The conusee made a feoffment in fee; the annuity was not paid, and the conusor entered on the feoffee's lessee. The Court of Common Pleas held that the feoffment had not destroyed the use to the conusor, "for it is a charge or burden upon the land, which goes along with the land, in whosoever hands it comes. And being limited to the conusor himself, Glanville [J.] conceived it to be a condition unto him; but if it had been to a stranger, to have arisen upon such a condition, the non-performance thereof had been a springing [or, as we should now say, "shifting"] use unto him; for now it is merely a tie and charge upon the land, which is not destroyed by the feoffment; and although it be a future use, it may be well raised upon non-performance of the condition; as it was adjudged in *Bracebridge's Case*."² The springing use here was preserved under circumstances in which, according to *Chudleigh's Case*, a remainder limited by way of use would have been destroyed. The fact that the use arose as a penalty for breach of a condition in favor of the grantor seems to have had some influence — it is hard to say precisely what — on the decision.

§ 145. *Purslowe v. Parker*³ (1600). Devise of rents out of land; if the heir pay the "said annuities," he to have the land; if he do not pay them, then the executors to have it. The heir made a feoffment of the land, and the annuities were not paid. It was held by the Court of Queen's Bench that the feoffment had not destroyed "the contingent remainders," "for there is a diversity between a contingent remainder which

¹ Cro. El. 688.

² This is not *Bracebridge v. Cook*, Plowd. 416, as stated in the margin, but *Bracebridge's Case*, 1 Leon. 264.

³ 2 Roll. Ab. 253, pl. 2; Id. 793, pl. 2; cited *sub nom.* *Pinsloe v. Parker*, 2 Roll. R. 218, 219; *sub nom.* *Mullineux's Case*, Palm. 136.

depends on a limitation and contingent uses, for the feoffment in this case has not done away the limitations which are to persons known with certainty, between whom there is a privity as in this case.”¹ In the account given, 2 Roll. R. 219, the distinction is still more clearly stated to be between a limitation to persons certain which is not destroyed by a feoffment, and a limitation to a person uncertain which is destroyed. No difference between remainders limited by way of use and conditional limitations is taken.²

§ 146. *Wood v. Reingold*³ (1601). A. covenanted, in contemplation of marriage with B., to stand seised of land to the use of himself and his heirs until marriage, and then to the use of himself and B. and the heirs of his body. A. then let the land for years to C., married B., and died. Popham, C. J., and Gawdy and Clench, JJ., were of opinion that the lease bound the springing use but did not destroy it. Fenner, J., thought the use was neither destroyed nor bound. This was because the making of a lease did not destroy or affect the seisin of the freehold. Remainders limited by way of use are not destroyed by a lease. This was held six years later by the same court in *Bould v. Wynston*.⁴ It was assumed that if A. had made a feoffment instead of a lease, the shifting use would have been destroyed. “If a freehold be conveyed to one upon consideration, the future use shall not rise; for there is not any person seised to that use when it should arise.”⁵

§ 147. *Smith v. Warren*⁶ is the only early case which favors any distinction on the score of destructibility between remainders and conditional limitations; and no suggestion that the

¹ 2 Roll. Ab. 793.

² This notion that contingent interests are destructible when the contingency has reference to persons, but are not destructible when the contingency has reference to events, emerges here for the sole time in the law. Archer's Case,

1 Co. 66 b, which is cited, is no authority for such a distinction.

³ Cro. El. 764, 854.

⁴ Cro. Jac. 168; *sub nom.* Bolls v. Winton, Noy, 122; 2 Roll. Ab. 793 (1607). But see Barton's Case, Moore, 742, *contra*.

⁵ *Per* Fenner, J., Cro. El. 765.

⁶ Cro. El. 688; § 144, *ante*.

invalidity of a future limitation of real estate is dependent upon its remoteness appears until much later.¹

5. *Executory Devises of Terms introduced.*

§ 148. As has been said, it was in the discussion of executory devises of chattels real that the Rule against Perpetuities had its origin and took its shape.² Although chattels real were always devisable at common law, no attempt to limit an executory devise of them is to be found in the books till about the time of the Statute of Wills. But there is a case where a future bequest of the use of a chattel personal was held good.³ A distinction was taken between the bequest of a chattel personal to A. for life, which passed the absolute interest to A., and admitted no executory bequest; and a gift of the use of a chattel personal to A. for life, which gave A. the occupation only, and left the title in the executor. But in *Paramour v. Yardley* ⁴ it is said that a devise of the occupation of a term was the same as a devise of the land itself, so that this distinction could not be availed of for the establishment of executory devises of leaseholds. It now remains to trace the history of their gradual introduction. It will be remembered that the Statute of Uses did not apply to leaseholds, and that therefore the only conditional limitations of chattels real in England were executory devises.

§ 149. In *Anon.*⁵ (1536) a term was devised to A. and the heirs of her body, the remainder, if she died without issue within the term, to B. The Court of Common Pleas held that a term could not be "limited in remainder." The limitation would now undoubtedly be held bad, because after an

¹ See *Chilcott v. Hart*, 23 Color. 40, 54.

² Whatever may have been the case as to chattels personal, future limitations of chattels real were regarded as executory and not in the nature of remainders. See App.

F, §§ 807 *et seq.*, *post.* But cf. § 856, *post.*

³ 37 Hen. VI. 30. See §§ 80, *ante*, 826, *post.*

⁴ Plowd. 539, 542, 543.

⁵ Dyer, 7 a.

indefinite failure of issue; but the objection made at the time was apparently to an executory devise of a term under any circumstances. In *Anon.*¹ (1543) a slight advance seems to have been made on this. It was there said that if a term was devised to one for life, the remainder over, the remainder over is good; but if the devisee for life aliens, the remainder-man is without remedy.²

§ 150. In *Cecil's Case*³ (1566) an executory limitation of a term by deed was held bad, as it would be in England at the present day;⁴ but in *Anon.*⁵ (1568), Weston, Walsh, and Harper, JJ., are reported to have said: "The remainder of a term devised to one for term of life is good by devise, but not by estate executed in the lifetime." The reporter, however, who was then Chief Justice of the Court, adds, "Yet *quære* the first."

§ 151. Ten years afterwards, in *Welcden v. Elkington*⁶ (1578), it was distinctly held that an executory devise of a term on the death of the first taker was good and could not be destroyed by any act of the first taker; and in the thirty years following, the same or a similar point was frequently decided in the same way.⁷ The current of opinion, however, was not unbroken. In *Anon.*⁸ (1587) there are *dicta* by Anderson, C. J., and Rhodes, J., that an executory devise of a term after a life interest therein is void, and such a devise was

¹ Bro. Ab. Chat. 140, pl. 23.

² So *Anon.*, Dyer, 74 *b*, pl. 18 (1552). And see *North v. Butts*, Dyer, 139 *b* (1556).

³ Dyer, 253 *b*.

⁴ And see *Green v. Edwards*, Cro. El. 216; 1 Leon. 218; 1 And. 258; Moore, 297; §§ 807 *et seq.*, *post*.

⁵ Dyer, 277 *b*.

⁶ Plowd. 516; Dyer, 358 *b*; and see *Curson v. Karville* (1562) and *Wallis v. Arden* (1571) both cited in *Cole v. Moore*, Moore, 806, 807.

⁷ *Paramour v. Yardley*, Plowd. 539 (1579). *Amner v. Luddington*, 2 Leon. 92; 3 Leon. 89; Godb. 26; 1 And. 60 (1584). *Vincent Lee's Case*, 3 Leon. 110; *sub nom.* *Lee v. Lee*, Moore, 268 (1584). *Hannington v. Ryder*, 1 Leon. 92; *sub nom.* *Haverington's Case*, Owen, 6; *sub nom.* *Hannington v. Richards*, Golds. 59, 65; *sub nom.* *Rudiard v. Hannington*, 1 And. 162; Moore, 249, pl. 393 (1587). *Handall v. Brown*, Moore, 748 (1603). *Cole v. Moore*, Moore, 806 (1607).

⁸ 3 Leon. 195; 4 Leon. 192.

held bad by the Court of Common Pleas in *Rayman v. Gold*¹ (1592). In *Woodcock v. Woodcock*² (1600) the judges of the Court of Common Pleas expressed opinions that such a devise was void. Walmsley, J., said: "There are divers judgments against my opinion, but upon what reasons I understand not." In *Mallet v. Sackford*³ (1607) the Court of Queen's Bench was divided on the question. Coke, C. J., and Walmsley, J., thought such executory devise not to be good. Warburton and Daniel, JJ., thought that it was good.⁴

§ 152. But in *Manning's Case*⁵ (1609) and *Lampet's Case*⁶ (1612) it was solemnly adjudged that after a devise of a term for life, an executory devise over was good, and not destructible by the first taker; and although these decisions have been grumbled at⁷ they have never been overruled.⁸ *Lampet's Case*⁹ is the first case in which "perpetuity" is mentioned in connection with an executory devise. Lord Coke, C. J., in arguing against the proposition that an executory devisee

¹ Moore, 635.

² Cro. El. 795.

³ Cro. Jac. 198; 1 Roll. Ab. 610, pl. 4, 5. See § 82, *ante*.

⁴ See Rector of Chedington's Case, 1 Co. 153 a; *sub nom.* Lloyd v. Wilkinson, Moore, 478.

⁵ 8 Co. 94 b.

⁶ 10 Co. 46 b; *sub nom.* Lampitt v. Starkey, 2 Brownl. 172.

⁷ E. g. by all the judges of the Common Pleas and barons of the Exchequer (except Tanfield, C. B.). They said, "that the first grant or devise of a term made to one for life, remainder to another, hath been much controverted, whether such a remainder might be good, and whether all may not be destroyed by the alienation of the first party; and if it were now first disputed, it would be hard to maintain; but being so often adjudged, they would not now dispute

it." *Child v. Baylie*, Cro. Jac. 459, 461 (cf. W. Jones, 15). *Per Hide*, Twisden, and Browne, JJ., "Though we do not hold it fit to call in question the judgment in *Matthew Manning's Case*, yet do not think it safe to stretch the law against the ordinary rules of law further than in that case it is done." *Pearse v. Reeve*, Pollexf. 29, 30.

⁸ 2 Harg. Jurid. Arg. 41 *et seq.* Lewis, Perp. 83-89. See §§ 818 *et seq.*, *post*. Even after *Manning's Case* it was held in *Price v. Atmore*, 1 Bulst. 191; 4 Leon. 246; *sub nom.* *Price v. Almory*, Moore, 831, that if the executory devisee of a term died during the life of the first taker, his executor would not take his interest. But see *Welciden v. Elkington*, Plowd. 516, 525, *in marg.*, and cases cited.

⁹ 10 Co. 46 b, 52 a.

cannot release his interest to the first taker of the term, says that "it would be inconvenient that such manner of perpetuity should be made of a chattel, when of an inheritance neither by act executed by the common law, nor by limitation of an use, nor by devises in last wills, any perpetuity can be established."

6. *First Suggestions at the Bar of the Rule against Perpetuities.*

§ 153. In *Anon.*¹ (1536) a limitation of a term after an indefinite failure of issue had been held bad; but the objection apparently was not to the remoteness of the executory devise, but to any executory devise of a term whatever.² And in *Forster v. Brown*³ (1604), on a devise of a term to A. and the heirs of his body, but if A. died without issue, then to B. ~~it seems to have been held~~, although the case is obscurely reported, that the gift over was bad. But in *Tatton v. Molineux*⁴ (1610), which was decided by Lord Ellesmere, C., assisted by Warburton and Croke, JJ., it was said: "If the remainder of such a term be limited over, the particular donee in tail or for life cannot sell it to the prejudice of the remainder; but such a remainder will be preserved by the common law, as has been adjudged in the Court of Common Pleas,⁵ and also in Chancery, as divers decrees are there made." And so in *Retherick v. Chappel*⁶ (1612) it was held, on the authority of *Manning's Case*, that, on a devise of a term to A. so long as he should have issue, and if he died without issue, then to B., the remainder to B. was good.⁷

§ 154. Thus far there had been no distinction taken be-

¹ Dyer, 7 a.

² See § 149, *ante*.

³ Moore, 758.

⁴ Moore, 809; Pollexf. 24.

⁵ Probably *Manning's Case*, § 152, *ante*, which had been decided the previous year, is meant.

⁶ 2 Bulst. 28.

⁷ But see *Bennet v. Lewknor*, 1 Roll. R. 356, where it is said that this point was not argued in *Retherick v. Chappel*; and cf. *Child v. Baylie*, Cro. Jac. 459, 461, 462; *Palm*, 333, 335, 336; and *Wallis v. Arden* (1571) cited in *Cole v. Moore*, Moore, 806, 807, 808.

tween an executory devise of a term after a life interest and after an indefinite failure of issue. Both limitations were at first thought alike bad; and now *Manning's Case* was supposed to make them alike good. In *Bennet v. Lewknor*¹ (1616) the distinction between them was first clearly insisted on. Here there was a devise of a term to A. and his heirs male, with an executory devise over on failure of such heirs to a person living at the testator's death. The only report of the case contains nothing but the arguments of counsel in the Exchequer and a statement that the case was adjourned.² Serjeant Finch, who argued against the executory devise, gave three reasons for its invalidity. 1. That by intendment the estate of A. was to continue forever. 2. "If it is a good remainder, then there will be a possibility on a possibility." 3. "If it is a good remainder, then there will be a perpetuity of a chattel where there cannot be of a freehold, and there will be no means to dock it." Here we first meet the idea of remoteness as an objection to a limitation struggling to find expression.

§ 155. *Child v. Baylie*.³ This case, which came before the King's Bench in 1618, was as follows: A devise of a term to A. and his assigns, provided, that if A. died without issue living at his death, then the term should go to B.⁴ A. as-

¹ 1 Roll. R. 356.

² In the reports of *Child v. Baylie*, Cro. Jac. 459, 460; Palm. 48, 50, 333, 334; W. Jones, 15, it is said that the Court held the executory devise void; but in the report of that case in 2 Roll. R. 129, 130, it is said that this was only the remark *obiter* of one of the barons.

³ Cro. Jac. 459; Palm. 48, 333; W. Jones, 15; 2 Roll. 129. See *Duke of Norfolk's Case*, 3 Ch. Cas. 1, 34.

⁴ This is the correct form of the devise. It is so given in *Croke*, and in Palm. 48. In the report of

the case in the Exchequer Chamber, Palm. 333, the proviso is said to be that if A. dies within the term, without issue then living, which is substantially the same. In W. Jones it is given thus: "If A. dies without issue during the life of B." In 2 Roll. alone is it given simply, "If A. dies without issue during the term." The words "living at the death" must have been in the devise, for the argument in the Exchequer Chamber turns largely upon them. And in the *Duke of Norfolk's Case*, 3 Ch. Cas. 1, 34, Lord Chancellor Nottingham caused

signed the term and died without leaving issue at his death; and B. brought ejectment against the assignee. This case raised clearly the question whether the reason why a gift of a term after a general failure of issue was bad was to be found in its remoteness. If remoteness was the reason, then the gift here to B. was good, because it must take effect on the death of A., and that was not more remote than the gift which had been held good in *Manning's Case*. In the Court of King's Bench no attention was paid by counsel or court to the fact that the gift over was in case A. died without issue living at his death, it was treated as if the gift had been on failure of issue generally;¹ and the gift to B. was held bad because the gift was to A. and his assigns; because a term cannot be entailed; because it was the gift of a possibility on a possibility;² and because if the gift to B. was good it could not be barred by A., and thus future interests in chattels would be less destructible than they were in freeholds, "and if the law will not suffer such perpetuities of inheritances, then much less will it suffer perpetuities of chattels."³

§ 156. The evils arising from the Statute *De Donis* creating inalienable estates tail were familiar to the courts, and after their predecessors had, by the doctrine of *Taltarum's Case*, broken down the "perpetuities" of estates tail,⁴ the only perpetuities which they had had occasion to consider, they were resolved not to have them surreptitiously introduced by entailing long terms, to which the device of common recoveries could not be applied. Having been warned by the history of estates tail, they timely took the matter in hand, and in *Bennet v. Lewknor*,⁵ as devises after failure of issue could not be docked, they held such devises void *ab*

the record to be examined, and found that Croke's report was correct.

¹ 2 Roll. 129; Palm. 48; Cro. Jac. 459.

² This is sometimes called a "remote possibility;" but the context

shows that by "remote" is meant "improbable," not "distant in point of time."

³ 2 Roll. 129, *ad fin.*

⁴ See § 141, *ante*.

⁵ § 154, *ante*.

initio. If there was present to the mind of the Court of King's Bench in *Bennet v. Lewknor* and *Child v. Baylie* any idea that a limitation might be objectionable because it was to begin at too distant a day, such idea was still extremely vague.

§ 157. The case of *Child v. Baylie* was carried to the Exchequer Chamber in 1623.¹ There the attention of the Court was called by counsel to the fact that the limitation over to B. was not on the death of A. without issue generally, but on the death of A. without issue living at his death. But the judges² held "for the case in question, where there was a devise to one and his assigns, and if he died without issue then living, that it would remain to another, it is a void devise; and it is all one as the devise of a term to one and his heirs of his body, and if he die without issue, that then it shall remain to another, it is merely void; for such an entail of a term is not allowable in law, for the mischief which otherwise would ensue, if there should be such a perpetuity of a term."³ It is clear that "perpetuity" is not used here in the sense of remoteness, for obviously there is a great difference between the two devises in the matter of remoteness.⁴ Of *Retherick v. Chappel*⁵ the Court say, "And though there be such a judgment given in the King's Bench as allows the remainder to be good, yet time has discovered the inconvenience that such limitations have introduced in the republic."⁶

¹ Cro. Jac. 459, 460; Palm. 333; W. Jones, 15.

² Tanfield, C. B., dissented; Palm. 334, adds, "*totis viribus*." W. Jones, 15, says Denham, B., also dissented; but the other reporters do not agree with this. Palm. 335. Cro. Jac. 461.

³ Cro. Jac. 461.

⁴ It might be fairly urged that the ground taken by the Court would require them to hold that if a term is given for life to one, and on his death to another, as in *Manning's Case*, 8 Co. 94 b, § 152, *ante*,

the gift over to such other is bad; and they admit this. They say, "The first grant or devise of a term made to one for life, remainder to another, hath been much controverted, whether such a remainder might be good, and whether all may not be destroyed by the alienation of the first party; and if it were now first disputed, it would be hard to maintain; but being so often adjudged, they would not now dispute it." Cro. Jac. 461.

⁵ 2 Bulst. 28; § 153, *ante*.

⁶ Palm. 335, 336.

§ 158. The case of *Child v. Baylie* is important as showing that none of the twelve judges of England, except Chief Baron Tanfield,¹ were then disposed to recognize the question of remoteness as having anything to do with the validity of a limitation. But it is also important because Davenport (afterward Chief Baron of the Exchequer), in his argument before the Court of Exchequer Chamber for the validity of the gift over, was the first person to enunciate clearly the principle on which the Rule against Perpetuities rests. He said: "There is no danger of perpetuity by such a conveyance. For he took a diversity when the contingency is such as can or ought [*doet*] to happen in the life of the devisee.² There a remainder limited on such an estate in case of a devise of a chattel is good, as in our case, if he should die without issue of his body living at the time of his death, so that it does not exceed his life. But if the contingency be such as is foreign, [*forrein*] or is to commence *in futuro* after the death of the first devisee, there, because such limitation tends to make a perpetuity, a remainder limited on it is bad, as, if he should die without issue or without heir, that then it shall remain over. And on this diversity they strongly [*fortment*] rely."³

7. *Slow Judicial Recognition of Remoteness as the Essential Point in judging Future Limitations.*

§ 159. After the decision of *Child v. Baylie* in the King's Bench, but before the argument in the Exchequer Chamber, came in 1620 the case of *Pells v. Brown* in the King's Bench.⁴ A testator seised in fee devised the land to A. and his heirs, and if A. died without issue living B., then to B. and his heirs.

¹ Except also, possibly, Baron Denham, see note to the preceding section.

² It is printed "devisor," but clearly "devisee" is meant. It is corrected by an old hand into "devisee" in Judge Story's copy of

Palmer, now in the Library of the Law School of Harvard University.

³ Palm. 334. On this case, see also App. K, § 940, *post*.

⁴ Cro. Jac. 590; 2 Roll. R. 196, 216; Godb. 282; *sub nom.* Pills *v.* Brown, Palm. 131; *sub nom.* Petts *v.* Browne, J. Bridg. 1.

A. suffered a recovery and died without issue, living B. It was held by Montagu, C. J., Chamberlayne and Houghton, JJ., that B. was not barred. Doderidge, J., dissented on the ground that if the executory devise to B. was not destroyed by the recovery, "it would be a mischievous kind of perpetuity which could not by any means be destroyed."¹ His brethren replied: "There is no such mischief that it should maintain perpetuities, for it is but in a particular case, and upon a mere contingency, which peradventure never may happen, and may be avoided by joining him in the recovery who hath such a contingency."² The devise to B. was in fact not too remote within the Rule against Perpetuities as now established, but no question of remoteness was mooted in the case. It was assumed that the gift to B. was good; the question discussed was whether it was destructible. The remark of the Court that the objection of perpetuity might be avoided by joining B. in the recovery shows that "perpetuity" was not used as meaning a remote interest, but as meaning an inalienable interest. Although no question of remoteness was presented in *Pells v. Brown*, it is hard to overestimate its influence on the subsequent history of conveyancing. Had it been held that conditional limitations could be destroyed like contingent remainders, the need of a rule against remoteness might never have been felt; even if some such rule had finally been evolved, it would probably have been in other than its present form. But when conditional limitations were declared indestructible, the need of distinguishing between those which could be allowed and those which must be condemned as too remote was sure, sooner or later, to present itself to the courts.³

¹ Cro. Jac. 592.

² Cro. Jac. 593.

³ See 2 Harg. Jurid. Arg. 32 *et seq.* Lewis, Perp. 128-134. Lord Kenyon's "nervous expression" in *Porter v. Bradley*, 3 T. R. 143, that the case of *Pells v. Brown* "is the foundation, and as it were the

Magna Charta, of this branch of the law," refers not, however, to its deciding that an executory devise is indestructible, but to its deciding that the failure of issue intended was definite and not indefinite. See Marsden, Perp. 198.

In the case of *Gay v. Gay*, or

§ 160. After, however, as before the case of *Pells v. Brown* it was the consideration of chattels real to which the Rule of Perpetuities owed its growth. Down to and including the great *Case of the Duke of Norfolk*,¹ in the year 1681, there were, besides *Gay v. Gay*,² mentioned in the note to the pre-

Jay v. Jay, Styles, 258, 274 (1651), in the Upper Bench, there was a devise of a copyhold to A. and his heirs, but if A. died during the life of his mother then to B. and his heirs. "Rolle, Chief Justice, said, it is an inconvenience to devise such a contingent estate. Nicholas [J.] doubted, for he said it would shake many wills, if it might not be." The judgment is not reported. Latch, of counsel, is said to have "confessed that in the case of Pell and Brown, 17 Jac. rot. 44, the contrary was adjudged; but that there did appear such apparent inconvenience in it, that upon it the Court was afterwards divided, and 21 Jac., in the Serjeant's Case,* it was made a flat *quære*, and ever since it hath been disputable, whether a contingent devise be good or not, and in Jacob and Telling's Case it is not determined, and Hanbury and Cookrell's Case is not adjudged, but if it be, it is on my side; and Mich. 37 & 38 C. B. rot. 1149, it was adjudged upon solemn argument at the Bar, and on the Bench, contrary to the judgment in Pell and Brown's Case, if lands be devised to one and his heirs, and if he die without issue, that the land shall be to another and his heirs, this is no estate tail; for it cannot stand with the rules

of law to devise such an estate, for it is but a possibility, and if it should be more, it must be a fee upon a fee, and so a perpetuity, and it cannot be known within what bounds it shall end, either in case of years or life or other contingencies, and the comparison of Lampert's [Lampet's] Case is not like to this case, for that was of a term." These statements attributed to Latch find no support in the printed books, and both counsel and reporter bear rather an evil name for accuracy. See *per* Twisden, J., in *Foxwith v. Tremain*, 1 Mod. 296; Palmer, Preface; O. Bridg. Pref. p. ix; Wallace, Reporters (4th ed.) 262, 288. It is clear, however, that the judges felt anxious about the consequences of the decision in *Pells v. Brown*, that executory devises were indestructible. The notion that an executory devise was not barred by a recovery "went down with the judges like chopped hay." *Per* Powell, J., *Scattergood v. Edge*, 12 Mod. 278, 281. "These executory devises had not been long countenanced when the judges repented them; and if it were to be done again, it would never prevail." *Per* Treby, C. J., *Id.* 287.

¹ 3 Ch. Cas. 1.

² Styles, 258, 274.

* "It is true, it was made a question afterwards in the Serjeant's Case; but what then? We all know that to be no rule to judge by; for what is used to exercise the wits of the serjeants is not a governing opinion to decide the law." *Per* Lord Chancellor Nottingham, in the Duke of Norfolk's Case, 3 Ch. Cas. 1, 31, 32.

ceding section, only two cases in which the validity of executory devises of freeholds came in question, — *Snow v. Cutler* and *Taylor v. Biddal*. They are discussed below.¹ The decisions on executory devises of terms, on the other hand, were numerous. The principle announced by Davenport in *Child v. Baylie*,² that the validity of an estate on condition precedent depended not on the character but on the time of the contingent event, although ultimately to prevail, was, as we have seen, at first rejected by almost the entire bench, and won its way but slowly to judicial recognition.

§ 161. Two classes of executory devises of terms came before the courts, — those after a life interest and those after a failure of issue. In the latter class of cases, where the failure of issue was indefinite, the executory devises were held bad.³ In *Wood v. Sanders*⁴ (1669) a term was assigned in trust for A. for sixty years if he lived so long; then to B. for sixty years if she lived so long; then the trustees to assign to C. in case he survived A. and B. If C. died in the lifetime of A. and B., leaving issue who were living at the death of A. and B., then the trustees to assign to the one who should then be C.'s eldest son; if C. died without issue before such assignment, then to D. and the heirs of his body, and in default of such issue, then to E. C. died before A. and B. without issue, and E. was appointed his administrator. Then A. and B. died, and D. entered and afterwards died without issue. Lord Keeper Bridgman, assisted by Twisden, Rainsford, and Wilde, JJ., held that as C.'s interest had never vested, D.'s administrator was entitled to the trusts of the term.

¹ §§ 165, 172, *post*.

² See § 158, *ante*.

³ *Sanders v. Cornish*, Cro. Car. 230 (1631). *Backhouse v. Bellingham*, Pollexf. 33 (1664). (See § 361, *post*.) *Wood v. Sanders*, 1 Ch. Cas. 131; Pollexf. 35 (1669). *Love v. Wyndham*, 1 Mod. 50; 2 Keb. 637; 1 Sid. 450; 1 Lev. 290; 1 Vent.

79; 2 Ch. Rep. 14 (1670). *Burges v. Burges*, 1 Ch. Cas. 229; 1 Mod. 115; Pollexf. 40; Finch, 91 (1674). (See § 166, *post*.) *Knight v. Knight*, Pollexf. 42; Finch, 181 (1674). *Warman v. Seaman*, Pollexf. 112; 2 Ch. Cas. 209; Finch, 279; Freem. Ch. 306 (1675).

⁴ 1 Ch. Cas. 131; Pollexf. 35.

The case is very shortly reported. Its decision is inconsistent with any theory of a gift of a possibility upon a possibility being bad. Here the gift to D. was held good; and yet it took effect only in case C. died, only in case he died in the lifetime of A. and B., and only in case he died in the lifetime of A. and B. without issue. On the other hand the case falls short of deciding that remoteness is the only objection to the creation of a future interest. It was apparently still the opinion of the Court that if a term was given to A. and the heirs of his body, and A.'s interest vested, no gift over was good even though it was made contingent on the extinction of A.'s issue during a life in being.¹ And this is confirmed by *Boucher v. Antram*.² There a legacy was given to A. "for her to have the use of it during her life, and her child or children to have it after her decease, but if she happens to die, leaving no child surviving her," then to B. It was held by Lord Keeper Bridgman that the gift to B., "it being a personalty, is in the nature of a perpetuity," and was void.³

§ 162. The other class of executory devises of terms which came up for consideration were gifts after life interests. In accordance with *Manning's Case*⁴ such gifts continued to be held good.⁵ In *Cotton v. Heath*⁶ (1638) a case was referred out of Chancery to Jones, Croke, and Berkeley, Justices of the King's Bench. A. devised a term to his widow for eighteen years, then to C. for life, and then to the eldest issue male of C. for life. The judges resolved without question,⁷ and the Lord Keeper Coventry agreed,⁸ that "although C. has not any issue male at the time of the devise and death of the devisor, yet if he has issue male before his death, this issue male shall

¹ See *Howard v. Norfolk*, 2 Ch. Rep. 229, 239; 2 Swanst. 454, 467, 468.

² 2 Ch. Rep. 65; Pollexf. 37 (1671).

³ See also *Pearse v. Reeve*, Pollexf. 29.

⁴ 8 Co. 94 b; § 152, *ante*.

⁵ E. g. *Veizy v. Pinwell*, Pollexf. 44.

⁶ 1 Roll. Ab. 612, pl. 3; Pollexf. 26.

⁷ Pollexfen says that the certificate was signed by two of the judges.

⁸ See Pollexf. 26.

have it as an executory devise, because although it is a contingency on a contingency, and the issue not *in esse* at the time of the devise, yet inasmuch as it is limited to him only for life, it is good, and all one with *Manning's Case* ;” and further,¹ that a feoffment by C. after the birth of issue male did not destroy the executory devise.

§ 163. Twenty-three years later, however, in 1661, Lord Chancellor Clarendon, assisted by Twisden and Browne, JJ., held, in *Apprice v. Flower*,² that after the devise of a term to A., a devise of it to the unborn children of A. was void, because it “tended to raise and create a perpetuity contrary to the rules of law.” As such limitations were the ordinary form in which freehold land was settled and devised, the objection would seem to have been the indestructibility of chattel interests. In accordance with *Apprice v. Flower* it was said by Hyde, Twisden, and Browne, JJ., in *Pearse v. Reeve* ³ (1661): “Though we do not hold it fit to call in question the judgment in *Matthew Manning's Case*, yet do not think it safe to stretch the law against the ordinary rules of law, further than in that case it is done; and, therefore, if the devisor by his will doth limit the remainder of it to his children, or to the issue of his body, whereby his intention appears to limit it in a kind of perpetuity to his issue or to his children, we hold such limitation to be void.” And in *Goring v. Bickerstaffe* ⁴ (1662), before Lord Chancellor Clarendon, assisted by Foster, C. J., Bridgman, C. J., and Hales, C. B.,⁵ the Court “did all agree in one uniform opinion, that the limitation of a term to several persons in remainder, one after another, if those persons were in being, and particularly named, could not tend to a perpetuity; otherwise, if the persons were not in being, and that a man might declare the trust of a possibility in remainder, but that the limitation of a

¹ See Pollexf. 26.

² Pollexf. 27; 1 Ch. Rep. 175.

³ Pollexf. 29.

⁴ Freem. Ch. 163; 1 Ch. Cas.

4; Pollexf. 31.

⁵ So in Pollexfen; in Chancery Cases, Wyndham, J., is given instead of Bridgman, C. J.

trust of such possibility to the heir of the limiter was a void limitation.”¹

§ 164. In *Sackville v. Dobson*² (1663), however, there was a limitation of the trust of a term to husband and wife, and the longest liver of them, for life, and after to the eldest issue of them, none being then born. It was held that though a gift to an unborn person, after two limitations to persons living, was void, yet a gift to an unborn person after one such limitation was good, and that the limitation to husband and wife was but one limitation, and therefore the gift over in this case was good.³

§ 165. In the series of cases on chattels real must be intercalated the case of *Snow v. Cutler*⁴ (1664). A., having the reversion of copyhold land after his wife's death, devised it to the heirs of his wife's body, if he or they should attain fourteen years. A. died without leaving issue by his wife. She married again and had a son who reached fourteen. She then died. The question was whether the son was entitled. The judges seem to have been in great doubt. Kelyng, C. J., and Twisden, J., thought the devise good. Wyndham and Morton, JJ., *contra*. The objection of the two latter seems to have been that the devise was in form a present devise to a person not *in esse*. Thus Wyndham says: “A present devise to an infant *in ventre sa mere* is void; *contra* if it be said ‘when he shall be born;’ so to J. S. when he shall marry my daughter, this is executory and good; so had our devise been to the heir, when he shall be born, [it] had been good; but this being to the heirs of the wife, it's intended present, and so void.”⁵ But the judges are said to have been all agreed that an executory devise “may well be allowed to take place within the compass of a life, but not after a dying without issue, for that

¹ Freem. Ch. 166.

² 1 Ch. Cas. 33.

³ The case seems to have been decided on a misunderstanding of *Goring v. Bickerstaffe*.

⁴ 1 Lev. 135; 1 Keb. 752, 800, 851; 2 Keb. 11, 145, 296; T. Raym. 162; *sub nom.* *Snow v. Tucker*, 1 Sid. 153.

⁵ 1 Keb. 802.

would make a perpetuity.”¹ This is the clearest statement given up to this time of the proposition that the validity of an executory devise depends upon the question whether it must happen within a lifetime.²

§ 166. Returning now to the cases of terms for years, the next is *Burges v. Burges*³ (1674). There a term was settled in trust for A. for life, then for his wife for life, then for their first and other sons successively and the heirs of their bodies, and then for their daughters. Lord Keeper Finch, while holding that the limitation to the daughters was void,⁴ yet “would allow one contingency to be good, viz. that to the first son, though the first son was not *in esse* at the time of his decease.”⁵ In *Oakes v. Chalfont*⁶ (1674) Lord Keeper Finch went a step further, and held that the limitation of a term after limitations to unborn children was good, if the children took life interests only, and the limitation over was to a person *in esse*.

§ 167. In the case of *Goring v. Bickerstaffe*⁷ (1662) we found the first distinct enunciation of the proposition that the number of executory limitations of a term is immaterial if they are all to persons in being.⁸ But in *Love v. Wyndham*⁹ (1670) this was more emphatically expressed. In that case there was a devise of a term to A. for life, then to B. for life, but if B. should die without issue to C. It was held that an indefinite failure of issue was meant, and this being so, of course the devise to C. was void. The case is noteworthy on

¹ 1 Lev. 136.

² Kelyng, C. J., is reported to have said, “Where the intent is exprest to be in future, it is an executory devise; and if an ordinary contingency be thereupon limited, which may determine within one life or such time, it’s good.” 2 Keb. 300.

³ 1 Ch. Cas. 229; 1 Mod. 115; Pollexf. 40; Finch, 91.

⁴ See § 161, *ante*.

⁵ 1 Mod. 115.

⁶ Pollexf. 38; *sub nom.* Chalfont v. Okes, 1 Ch. Cas. 239.

⁷ Freem. Ch. 163; 1 Ch. Cas. 4 Pollexf. 31; see § 163, *ante*.

⁸ See passage cited in § 163, *ante*.

⁹ 1 Mod. 50; 2 Keb. 637; 1 Sid. 450; 1 Lev. 290; 1 Ventr. 79; 2 Ch. Rep. 14. See § 226, *post*; and also *Huntbatch v. Lee*, 3 Keb. 750 (1676), obscurely reported.

account of some remarks of Twisden, J. They are differently reported. In 1 Mod. 54, thus: "If a tenant of a term devise it to B. for life, the remainder to C. for life, the remainder to D. for life; I have heard it questioned, whether these remainders are good or not? But it hath been held, that if all the remaindermen are living at the time of the devise, it is good: if all the candles be light at once it is good. But if you limit a remainder to a person not in being, as to the first-begotten son, etc. and the like, there would be no end if such limitations were admitted, and therefore they are void: and some judges are of the same opinion to this hour." In 1 Sid. 451: "Note by Twisden, J., that the law is now settled, and if a term be devised to one for life, remainder to another for life, remainder to a third for life, etc., and so to twenty, one after the other, that it is a good devise to them all, notwithstanding the objection of possibilities upon possibilities, if all the persons were *in esse* at the time of the devise, because all the candles are lighted at once. But if the devise be to one for life, who is not then *in esse* (as to the first son), there no limitation of a term can be after that. And of this opinion seemed all the court." ¹

§ 168. The law up to this time may be summed up thus: Any number of life interests could be given in succession to persons in being.² Limitations to unborn persons might be good.³ But the remoteness in time of a contingency was not the sole test of the validity of an interest conditioned on it. The nature of the contingency was also involved. Thus a gift of chattels after an indefinite failure of issue was bad, although confined to a failure within the lifetime of persons in being. This had been held in *Child v. Baylie*,⁴ and had never been overruled. It was reserved for Lord Nottingham, in the great *Case of the Duke of Norfolk*, against the opinion

¹ The case of *Taylor v. Biddal* is the next in chronological order, but it will be most conveniently considered later. See § 172, *post*.

² *Goring v. Bickerstaffe*, *Love v. Wyndham*, §§ 163, 167, *ante*.

³ See *Burges v. Burges*, § 166, *ante*, but under what restrictions was far from clear. §§ 162-164.

⁴ §§ 155-158, *ante*.

of the heads of all the law courts, to establish for the first time, but on a foundation which has never been shaken,¹ the doctrine that the validity of a contingent interest depends upon its distance in time, and not upon the character of the contingency.

8. *Rule against Perpetuities established.*

§ 169. The *Duke of Norfolk's Case*² was this: Land was conveyed by the Earl of Arundel to trustees for a long term, in trust for B. his second son and the heirs male of his body, but if A., the Earl's eldest son, should die without issue male in the life of B., or if the earldom should descend upon B., then the trust to be for C., the third son.³ A. died without issue in the life of B., and the question arose in Chancery whether the executory devise to C. was good. Lord Chancellor Nottingham called in the assistance of Pemberton, C. J., North, C. J., and Montagu, C. B. The judges were all of opinion that the executory devise to C. was bad as tending to a perpetuity; but the Lord Chancellor was of an opposite opinion, and made a decree in favor of C. A bill of review was filed, and in 1683 Lord Keeper North reversed the Chancellor's decree; but, on appeal to the House of Lords, the decree of the Lord Keeper was, in 1685, reversed, and Lord Nottingham's decree affirmed.⁴ The question in this case was whether, after a limitation of a term to one and the heirs of his body, there could be a limitation over. The judges were of opinion that there could not be. The Chancellor held the limitation over good, provided the contingency on which the limitation over was to take effect must happen within a life in being. He said that no one now disputed that a contingent

¹ "From that time to the present, every judge has acquiesced in that decision." *Per* Lord Kenyon, *Long v. Blackall*, 7 T. R. 100, 102.

² 3 Ch. Cas. 1; Pollexf. 223;

sub nom. *Howard v. Norfolk*, 2 Ch. Rep. 229; 2 Swanst. 454.

³ The conveyance was drawn by Sir Orlando Bridgman. See 3 Ch. Cas. 27.

⁴ 3 Ch. Cas. 53.

limitation of a term to take effect within, or at the end of, the life of one to whom an interest for life was limited in the term was good, and it was absurd to make any distinction because the first taker was declared to hold to himself and the heirs of his body, if the limitation over was only on a contingency which could not happen after his death; that it was obvious that there was no more a perpetuity in the one case than in the other; and, in short, that if the future estate must vest within a lifetime, it was immaterial what was done with the term before it vested. This case overruled *Child v. Baylie*, and put the law on a rational basis. It has not been shaken since. In favor of the plaintiff the supposed doctrine that you could not have a possibility upon a possibility was invoked, but it met with no favor in any quarter. "There may be a possibility upon a possibility, and a contingency upon a contingency, and in truth every executory devise is so, and therefore the contrary rule given by Lord Popham in the *Rector of Chedington's Case* is not reason. These things were agreed by all." ¹ Lord Nottingham was pressed with this case: "Suppose a contingency which must take effect, if at all, within one hundred years, but may not take effect any sooner. What then? Where will you stop?" "Where?" he answered; "why, everywhere, where there is not any inconvenience, any danger of a perpetuity; and whenever you stop at the limitation of a fee upon a fee, there will we stop in the limitation of a term of years." ² "But what time? and where are the bounds of that contingency? You may limit, it seems, upon a contingency to happen in a life. What if it be limited, if such a one die without issue within twenty-one years or a hundred years, or while Westminster Hall stands? Where will you stop, if you do not stop here? I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear; for the just bounds of a fee simple upon a fee simple are not yet determined,

¹ 2 Ch. Rep. 237. See to the same effect, 3 Ch. Cas. 29, 30; and on the nature of a perpetuity, 3 Ch. Cas. 31.

² 3 Ch. Cas. 36.

but the first inconvenience that ariseth upon it will regulate it.”¹

§ 170. The *Duke of Norfolk's Case* marks the close of the first stage in the history of the Rule against Perpetuities. It was now a settled point that a future interest might be limited to commence on any contingency which must occur within lives in being. Whether this period could be extended remained to be determined. Before considering the series of decisions on this point, one matter must be noticed. Notwithstanding the first decision in the *Duke of Norfolk's Case*, it is said in *Massenburgh v. Ash*² (1684) that “it was agreed by the counsel and so declared by the Court,” “that the general rule that has hitherto obtained was, that you might limit a term to as many persons as you would, one after another, that were *in esse* at the time of the limitation; and one step further, to a person not *in esse*; but that there could be but one contingent remainder of a term for years.” This seems to be the last case in which the number of contingent interests is suggested to be of importance; and in *Gulliver v. Wickett*³ (1745) (a case, it is true, of freeholds, not leaseholds) we find Lee, C. J., saying, “The number of contingencies are not material, if they are all to happen within a life in being, or a reasonable time afterwards.”

9. *Extension of the Rule so as to cover the Minority of a Grantee or Devisee.*

§ 171. The first extension of the period within which future interests might be created was to make it cover the time necessary for the birth of posthumous children, and also the minority of an executory devisee unborn at the death of the testator. In *Snow v. Cutler*⁴ there had been a devise to the heirs of the body of the testator's wife, if he or they should attain four-

¹ 3 Ch. Cas. 49.

² 1 Vern. 234.

³ 1 Wils. 105.

⁴ 1 Lev. 135; 1 Keb. 752, 800,

851; 2 Keb. 11, 145, 296; T. Raym.

162; *sub nom.* *Snow v. Tucker*, 1

Sid. 153; § 165, *ante*.

teen years. The Court was divided on the question whether the devise was good. It seems, however, that the objection of those who thought it invalid was to the form rather than to the substance, and that if the devise had been "to the heir when he shall be born," they would have deemed it good.

§ 172. In *Taylor v. Biddal*¹ it appeared by special verdict in ejectment that A. devised land to his sister B., the wife of C., until D., the son of B. and C., should reach twenty-one, and then to D. and his heirs, but if he should die under twenty-one, then to the heirs of the body of C. and to their heirs "as they should attain their respective ages of twenty-one years."² D. died under twenty-one, then B. died, leaving a daughter, E., the defendant, the sole surviving issue of herself and C. Then C. died, leaving E. of full age.³ E. claimed, therefore, either as heir of the body of C., or if the devise to such heir was void, then as heir of her brother D. The plaintiff's lessor was the heir of A. The case was argued in the Common Bench in 1678.⁴ The reports agree that the Court held that D.'s estate was vested, and E. entitled as his heir, even if the executory devise over to her was void.⁵ As to the executory devise, Freeman⁶ says the Court was of opinion it was bad; but the report in 2 Modern⁷ makes Chief Justice North declare it good. As Mr. Hargrave⁸ remarks, it is hard to reconcile the language attributed to the Chief Justice in 2 Modern

¹ 2 Mod. 289; Freem. K. B. 243.

² These last words are omitted in Freeman's Report, but in Carter's Report (*vide infra*) the words are: "As they or any of them shall accomplish the age of twenty-one years."

³ See 2 Mod. 293.

⁴ Another ejectment had been brought before the death of C. The arguments are reported under the name of *Taylor v. Wharton*, Carter,

182 (1667), but no judgment is given. In Freeman, the second ejectment is reported as having been argued at Hilary Term, 1677. The year then began in March. According to our present reckoning the case was argued, as stated, in 1678.

⁵ Freem. K. B. 244; 2 Mod. 292, *ad fin.*

⁶ P. 244.

⁷ P. 293.

⁸ 2 Harg. Jurid. Arg. 36.

with his opinion in the *Duke of Norfolk's Case*;¹ but, notwithstanding, it appears to be the fact not only that the Court thought the executory devise good, but that they gave judgment for the defendant on that ground. For Lord Hardwicke and the other judges of the King's Bench, in certifying to the Court of Chancery in 1736 that a devise to grandchildren when they reach twenty-one was good,² said: "We do not find any case wherein an executory devise of a freehold hath been held good, which hath suspended the vesting of the estate until a son unborn should attain his age of twenty-one years, except the case of *Taylor v. Bydall*, adjudged upon a special verdict in the Court of Common Pleas, Hil. 29 & 30 Car. 2, and reported in 2 Mod. 289. That resolution appeared in every view of it to be so considerable in the present case, that we caused the record to be searched, and find it to agree in the material parts thereof with the printed report; and therefore, however unwilling we may be to extend executory devises beyond the rules generally laid down by our predecessors, yet upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years, and considering that the power of alienation will not be restrained longer than the law would restrain it, viz. during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity; and that this construction will make the testator's whole disposition take effect, which otherwise would be defeated; we are of opinion that the devise before mentioned may be good by way of executory devise." And in *Lovell v. Lovell*,³ where a question arose whether on a gift to A. till B. reaches twenty-one, and then to B., B. takes a vested interest, and *Taylor v. Biddal* was cited, Lord Hardwicke, C., said: "*Taylor versus Biddal* is upon an executory devise; for I had a very particular reason to look into this case in *Stephens versus Stephens*, and therefore sent for the record out of the treasury; not truly stated in

¹ § 169, *ante*.

³ 3 Atk. 11, 12.

² *Stephens v. Stephens*, Cas. temp. Talb. 228, 232; § 175, *post*.

the report of the case, for the other point mentioned in the book could not arise, being determined only upon an executory devise."

§ 173. In *Luddington v. Kime*¹ (1697) Powell, J., having expressed an opinion that on a devise to A., and if he should have a posthumous son born, to such son, the limitation to the son would be a good executory devise, "Treby, Chief Justice, doubted much of that, and was of opinion that the time allowed for executory devises to take effect ought not to be longer than the life of one person then *in esse*."²

§ 174. *Gore v. Gore*.³ Devise of land to A. for five hundred years, and after the determination of the term to the first and other sons of B., the testator's son. B. was then a bachelor. Lord Macclesfield sent the case to the Court of King's Bench, who in 1722 certified that the executory devise to the first son of B. was bad, "because it is not to take place within that compass of time which the law allows." The case against the devise was argued (1) by Mr. Bootle, who impugned it on the ground that if B.'s first son was posthumous, the estate would not vest until after a life in being; and (2) by Mr. Peere Williams, who contended that the devise might not vest till the end of the term for five hundred years. Sir John Strange says that the judges thought the devise bad on the first ground, "because it might subsist forty weeks after the death of" B., "and they were not for going a day farther than a life in being."⁴ Mr. Peere Williams in his report⁵ quotes the certificate of the judges as if they decided the case for the reason urged by him, "it was too remote (*viz.*) after five hundred years;" but the words "(*viz.*) after five hundred years" are no part of the certificate, which he afterwards⁶ gives *verbatim* in full. Whatever the grounds, Lord Macclesfield was not pleased with the certificate, and afterwards

¹ 1 Ld. Raym. 203, 207.

Mod. 4; 10 Mod. 501; W. Kel. 254;

² Such a limitation would now be held a good contingent remainder. See *Reeve v. Long*, 3 Lev. 408.

2 Barnard. K. B. 209, 229, 355.

⁴ 2 Stra. 958.

⁵ 2 P. Wms. 63.

⁶ 2 Stra. 958; 2 P. Wms. 28; 9

⁶ P. 64.

Lord King, becoming Chancellor, sent it back to the Court of King's Bench. On the argument Lord Raymond, C. J., expressed himself not satisfied with the previous certificate;¹ but before the case was decided Lord Raymond was succeeded by Lord Hardwicke.² The case was argued again, and the Court sent, in 1734,³ another certificate, in which they declared that the executory devise was good; and Lord Talbot, who was now Chancellor, decreed accordingly. Lord Raymond, C. J., and Page, J., "doubted whether there was any other rule which the Court could go by in judging upon such a devise, than to consider whether it tended to a perpetuity or not."⁴

§ 175. In 1736, in the case of *Stephens v. Stephens*,⁵ Lord Hardwicke and the other judges of the King's Bench certified, and Lord Chancellor Talbot decided, that an executory devise to a child of a person living at the testator's death on such child's reaching majority was good. The judges came reluctantly to this conclusion, but conceived themselves bound by *Taylor v. Biddal*.⁶ Lord Mansfield, in *Doe v. Fonnereau*,⁷ said: "In *Stephens v. Stephens* the Court took a large stride of twenty-one years after a life in being. The argument was, that this would not create a perpetuity. Former cases had said a limitation might be made to take effect on the death of a person *in esse*, or the birth of a posthumous child; and alienation was not restrained for any longer time in *Stephens v. Stephens*, for, if a devise could hold to a posthumous child, there could be no alienation till he should attain the age of twenty-one." The step had perhaps been taken before *Stephens v. Stephens*, but that case may be said to have firmly settled the law, that a future gift to the child of a living person upon such child's reaching majority is not too remote. The point has never been questioned since.⁸

¹ W. Kel. 259.

² 2 Barnard. K. B. 355.

³ 2 P. Wms. 64.

⁴ 2 Barnard. K. B. 212.

⁵ Cas. temp. Talb. 228; W. Kel. 168; 2 Barnard. K. B. 375.

⁶ 2 Mod. 289; Freem. K. B. 243; see § 172, *ante*.

⁷ 2 Doug. 487, 508.

⁸ The inconsistency of this extension with legal principle and analogy is discussed, §§ 187, 188, *post*.

10. *Extension of the Rule so as to cover a Term in Gross.*

§ 176. The period within which future devisees could be created was therefore extended beyond lives in being to cover the minorities of the devisees. Could it be further extended? and if so, to what limit? In *Pay's Case*¹ (1602) there was a devise to A. from Michaelmas following the testator's death for five years, and then to B. in fee. It was held, without argument, that the devise to B. was good. The objection of remoteness was not raised, nor at that early day was it likely to be raised.

§ 176 a. *Massingberd v. Ash*² (1685). A term was assigned in trust for A. and his wife during their lives and the life of the survivor, but if there should be issue male of their bodies living at the death of the survivor, then to their eldest son, but if he died before twenty-one years of age, then to the second and other sons, there being a limitation over on the death of any son under twenty-one to the next son; but if there should be no such issue living at the death of the survivor of A. and his wife, or if all such issue should die before reaching twenty-one, then to B. A. and his wife had issue one son who died after A., but in the lifetime of the wife.³ A case was sent from Chancery to the Court of Common Pleas, the judges of which certified that the devise to B. was good; and the Lord Keeper Guilford decreed accordingly. The devise to B. was in the alternative, either on the death of the issue before A. and his wife, or upon their death after their parents under twenty-one. The former alternative had taken place, and the devise to B. was clearly good, without raising the question whether it would have been good had the issue of A. and his wife outlived their parents and died under twenty-one; but the counsel and judges seemed to have considered

¹ Cro. El. 878; *sub nom.* *Payne v. Ferrall*, Noy, 43; § 139, *ante*.

² 2 Ch. Rep. 275; *sub nom.* *Massenburgh v. Ash*, 1 Vern. 234, 257, 304.

³ See 2 Ch. Rep. 278, 282. The statement in 1 Vern. 234, that the son died after the wife, is, it seems, wrong.

the case as involving the question whether a limitation of an estate to begin within twenty-one years after a life in being was good; and the judges held it good.¹ The Lord Keeper, however, seems to have put the case rather on *Wood v. Sanders*,² and the death of the issue in the parent's life.³ This case differs from *Stephens v. Stephens*⁴ in that although the period of postponing a devise is a minority it is not the minority of the devisee.

§ 177. In *Davies v. Speed* (1692), in which case a springing use after the indefinite failure of A.'s issue was of course held too remote, Lord Holt, C. J.,⁵ said that a springing use to commence at the end of four years would be good, as would also one to begin after the death of A. without issue, if he die without issue within twenty years. But this was *obiter dictum*.⁶

§ 178. The case of *Lloyd v. Carew*,⁷ finally decided in 1698, is the foundation of that part of the Rule against Perpetuities which allows a future interest to be created beyond the termination of a life in being without regard to the minority of any person. There was a conveyance to A. and his wife for life, remainder to her children successively in tail, remainder to A. in fee, *provided* that if at the death of the survivor of A. and his wife there should be no issue of theirs then living, and if the heirs of the wife should, within twelve months after such death without issue, pay to the heirs of A. £4,000, then the estate should go to the heirs of the wife forever. A. and his wife both died without leaving issue living at the death of the survivor, and the heir of the wife tendered the £4,000. The question was, whether the executory devise to the heir of the wife was good. In favor of the executory devise it was argued "that it was within

¹ 2 Ch. Rep. 282, 283.

² 1 Ch. Cas. 131; Pollexf. 35; § 161, *ante*.

³ 1 Vern. 305.

⁴ See § 175, *ante*.

⁵ As reported in 2 Salk. 675, and Holt, 730.

⁶ In the other reports of the

case, 4 Mod. 153; 12 Mod. 38; Skin. 351; Carth. 262, the remark is not given. The decision was affirmed in the House of Lords; Show. P. C. 104.

⁷ Prec. Ch. 72, 106; Show. P. C. 137.

the reason of the contingent limitations allowed in the *Duke of Norfolk's Case*; . . . that the *ultimum quod sit* of a fee upon a fee is not yet plainly determined; that there could not in reason be any difference between a contingency to happen during life or lives in being, and within one year after; and the reason of allowing them to be good, if confined to lives in being, or upon their decease, was, because no inconvenience could follow, and the same rule will hold to a year after; and that the true rule to set bounds to them is, when they prove inconvenient and not otherwise." Against the executory devise it was urged that the life of one or more persons in being was "the furthest the judges have ever gone in allowing contingent limitations upon a fee, and if they should be extended to contingencies to happen within twelve months after the death of one or more person or persons in being, they may as well be extended to contingencies to happen within one thousand years; and so all the inconveniences of a perpetuity will be let in."¹ Sir John Somers, C., assisted by Treby, C. J., and Rokeby, J., held that the executory devise was bad. But the Chancellor's decree was reversed on appeal by the House of Lords, Jan. 13, 1698. It is worthy of notice that at this time, with the exception of the Chancellor, there was no law lord in the House.²

§ 179. In *Marks v. Marks*³ (1718) an executory devise to arise on the payment of a sum of money within three months after the death of a person living at the death of the testator was held good by Lord Chancellor Parker, assisted by Sir Joseph Jekyll, M. R. The Master of the Rolls said: "Though

¹ Prec. Ch. 73, 74.

² 16 Lords' Journals, 192 a, 193 b. The Earl of Macclesfield mentioned as being in the House was not the Chancellor of that name, who was not raised to the peerage till the reign of George I. This peer belonged to an earlier creation, which became extinct in 1702. The statement of Lord Brougham in *Cadell v. Palmer*, 1

Cl. & F. 372, 422, that the House of Lords, in deciding *Lloyd v. Carew*, were assisted by "the then Chief Justice of the Common Pleas," is wrong. It was the Chancellor, whose decree was reversed, that was assisted by Chief Justice Treby.

³ 10 Mod. 419; 1 Stra. 129; Prec. Ch. 486.

before the case of *Lloyd v. Carew*, it seems to have obtained for law, that no executory devise of a fee upon a fee should be allowed of, unless upon a contingency to happen during the life of one or more persons in being at the time of the settlement . . . yet since that case which went through the House of Lords, and is reported Shower's Cases in Parliament, 137, the law is now settled, that in case of a contingency that cannot in the nature of it precede the death of a person, a reasonable time may be allowed subsequent to the decease of that person for performance of the condition; and a fee limited thereupon is good. In that case, a year was held no unreasonable time; *a fortiori* not three months, which is the present case." ¹

§ 180. Although *Lloyd v. Carew*, followed by *Marks v. Marks*, settled that a future interest might be created within a "reasonable time" after the expiration of lives in being, the question of what that "reasonable time" was remained undetermined for more than a century. In *Massingberd v. Ash*,² decided in 1685, thirteen years before *Lloyd v. Carew*, the judges of the Court of Common Pleas had declared of certain limitations that "being limited and confined to fall within the compass of twenty-one years" they were good.³ In *Scatterwood v. Edge*,⁴ decided in 1699, the year after the House of Lords had overruled Lord Somers's decree in *Lloyd v. Carew*, there was a devise to A. for eleven years, and subject thereto to the first issue male of B. and the heirs male of his body, provided they should take upon themselves the surname of E. B., at the time of the devise, had no issue. As Lord

¹ 10 Mod. 422.

² 2 Ch. Rep. 275; *sub nom.* *Mas-senburgh v. Ash*, 1 Vern. 234, 257, 304; § 176 *a, ante*. The cases of *Massingberd v. Ash*; *Maddox v. Staines*, 2 P. Wms. 421; *sub nom.* *Staines v. Maddock*, 3 Bro. P. C. (Toml. ed.) 108 (see Fitzg. 318); and *Stanley v. Leigh*, 2 P. Wms.

686, were inserted in the first edition under the preceding head, §§ 173, 175, but they come properly under this.

³ 2 Ch. Rep. 282, 283.

⁴ 1 Salk. 229; *sub nom.* *Scattergood v. Edge*, 12 Mod. 278 (see *Gore v. Gore*, 2 Barnard. K. B. 209).

Thurlow remarks,¹ the case of *Scatterwood v. Edge* "is so ill reported, that it is not easy to discover what points were determined." Blencowe, J., thought the devise to the issue male of B. good. Treby, C. J., and Neville and Powell, JJ., thought it bad. The opinion of the two latter on the point of remoteness is not clear; but that of the Chief Justice, at any rate, is emphatic. "There are bounds," he says, "set to them [executory devises], viz. a life or lives in being; and further they shall never go, by my consent, at law, let Chancery do as they please,"² — an obvious reflection on *Lloyd v. Carew*, where the decree rendered in accordance with his advice had been overruled by the House of Lords. The case was affirmed in the King's Bench on error. Lord Holt is declared there to have said that "the time in which an executory devise was to arise was not then settled."³

§ 181. In *Maddox v. Staines*⁴ there was a bequest to A. for life, and on his death, to his children, but if they died under age, then to B. It was held by Sir Joseph Jekyll that the executory bequest to B. was good. Lord Chancellor King affirmed the decree, and his decree was affirmed by the House of Lords. In *Stanley v. Leigh*,⁵ a devise of a term with similar limitations was elaborately discussed by Sir Joseph Jekyll, M. R., and a gift over on death under twenty-one of persons not in being at the testator's death was held good. The Master of the Rolls defined "a perpetuity, as it is a legal word or term of art," as "the limiting an estate either of inheritance or for years, in such manner as would render it unalienable longer than

¹ In *Doo v. Brabant*, 3 Bro. C. C. 393, 398.

² 12 Mod. 287.

³ *Gore v. Gore*, W. Kel. 254, 259; 2 Barnard. K. B. 209, 212. See also *Gore v. Gore*, 2 Barnard. K. B. 229, 230. The statement in Salkeld's report of *Scatterwood v. Edge*, attributed to all the judges, that every executory devise is "a perpetuity as far as it goes, that

is to say, an estate unalienable, though all mankind join in the conveyance," has often been cited with approval, and has more than one wrong decision to answer for. See § 269, *post*.

⁴ P. Wms. 421; *sub nom.* *Staines v. Maddock*, 3 Bro. P. C. (Toml. ed.) 108 (see Fitzg. 318).

⁵ 2 P. Wms. 686.

for a life or lives in being at the same time, and some short or reasonable time after." In *Maddox v. Staines* and *Stanley v. Leigh*, as in *Massingberd v. Ash*,¹ the minority in question was not, it should be observed, the minority of the executory devisee but of a third person. In *Gore v. Gore*² the judges of the King's Bench, in their second certificate, given in 1734, said "that a convenient time after the life was to be allowed, according to the case of *Lloyd v. Carey*."

§ 182. Following these is a series of cases in which the courts are generally passing upon or considering executory devises arising upon the devisee attaining his majority, but in which they express themselves in general terms. Thus in *Goodtitle v. Wood*³ (1740): "The rule has in many instances been extended to twenty-one years after the death of a person in being." So in *Marlborough v. Godolphin*⁴ (1759): "It is true that by executory devise an estate may be locked up for a life and lives in being and twenty or twenty-one years after." So Lord Mansfield in *Goodman v. Goodright*⁵ (1759): "The allowed compass of a life or lives in being, and twenty-one years after, which is the line now drawn, and very sensibly and rightly drawn."⁶ So again Lord Mansfield in *Buckworth v. Thirkell*⁷ (1785): "I remember the introduction of the rule which prescribes the time in which executory devises must take effect to be a life or lives in being and twenty-one years afterwards."⁸ Lord Mansfield was called to the bar in 1730. In *Jee v. Audley*⁹ (1787) Sir Lloyd Kenyon, M. R., said:

¹ § 176 *a*, *ante*.

² 2 Stra. 958. See § 174, *ante*.

³ Willes, 211, 213.

⁴ 1 Eden, 404, 418.

⁵ 2 Burr. 870; 1 W. Bl. 188.

⁶ 2 Burr. 879. See *Doe v. Fon-nereau*, 2 Doug. 487, 502, 507, note. That Lord Mansfield had the case of a minority in his mind is shown by his remark during the argument of this case as given by Mr. Hargrave, *ex relatione* Mr. Filmer.

"That point is well settled; and a life and twenty-one years after is the utmost extent for an executory devise; and is no more than the common law allows in legal limitations, which restrains the heir from aliening till twenty-one." 2 Harg. Jurid. Arg. 102, 103.

⁷ 3 B. & P. 652, note; 10 J. B. Moore, 235, note.

⁸ 3 B. & P. 654, note.

⁹ 1 Cox, 324.

"The limitations of personal estate are void, unless they necessarily vest, if at all, within a life or lives in being and twenty-one years or nine or ten months afterwards. This has been sanctioned by the opinion of judges of all times, from the time of the *Duke of Norfolk's Case* to the present; it is grown reverend by age, and is not now to be broken in upon." And the same learned judge, when Chief Justice of the Court of King's Bench, in *Long v. Blackall*¹ (1797) said: "It is an established rule that an executory devise is good if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation." And in *Thellusson v. Woodford*² (1799) Mr. Justice Buller said: "The rule allowing any number of lives in being, a reasonable time for gestation, and twenty-one years, is now the clear law, that has been settled and followed for ages;³ and we cannot shake that rule without shaking the foundations of the law."⁴

§ 183. In none of these cases, however, was the attention of the Court drawn to the distinction between a term in gross and the minority of the devisee, and in most of them the circumstances, and in many of them the language of the expressions themselves, show that the judges were thinking only of minorities. And in *Thellusson v. Woodford* Lord Alvanley, M. R., said that the period of twenty-one years had never "been considered as a term, that may at all events be added to such executory devise or trust. I have only found this *dictum*; that estates may be unalienable for lives in being and twenty-one years, merely because a life may be an infant, or *en ventre sa mère*."⁵ And Macdonald, C. B., in delivering the opinion of the judges in the House of Lords, said: "The established length of time, during which the vesting may be suspended, is during a life or lives in being,

¹ 7 T. R. 100, 102. See s. c. 3 Ves. 486, 489; *Thellusson v. Woodford*, 11 Ves. 112, 150.

² 4 Ves. 227; 11 Ves. 112.

³ The "ages" were less than a hundred years.

⁴ 4 Ves. 319.

⁵ 4 Ves. 337.

the period of gestation, and the infancy of such posthumous child." ¹

§ 184. In *Beard v. Westcott* ² there were devises over after limitations which were too remote, and on a contingency of the death under twenty-one of the unborn children of persons living at the testator's death. Two objections were made to the devises over: in the first place, that they were after remote limitations; ³ and, secondly, that the contingency had no reference to the minority of persons who took under such devises. Sir William Grant, M. R., sent the case to the Court of Common Pleas, which in 1810 ⁴ certified that the limitations over were good.⁵ Sir William Grant doubted how far this term of twenty-one years could be thus taken, and ordered the Court to be again attended with the case on this particular question; ⁶ and in 1813 the Court returned a certificate to this additional query, that the case was not affected by the fact that the gifts over might take effect "at the end of an absolute term of twenty-one years after a life in being at the death of the testator, without reference to the infancy of the person intended to take." ⁷ Lord Eldon, not being satisfied with these certificates, sent the case in 1822 to the Court of King's Bench.⁸ The case sent called particular attention to the fact that the period of twenty-one years did not correspond to the infancy of the person intended to take the gift over; ⁹ and the question was elaborately argued by Mr. Sugden for the plaintiff and Mr. Preston for the defendant. The Court sent a

¹ 11 Ves. 143.

² 5 Taunt. 393; 5 B. & Ald. 801; T. & R. 25.

³ As to the validity of this objection, see § 252 *et seq.*, *post*, where the case is more fully stated.

⁴ The date of the certificate is given, 5 Taunt. 407, as 28 November, 1812, but it is printed at length in Gilbert's *Uses* (Sugd. ed.) 272-274, note, and is there dated 28 November, 1810; and this last

must be correct, because Sugden's edition of Gilbert was published in 1811. See also *Cadell v. Palmer*, 1 Cl. & F. 372, 394.

⁵ See this first certificate of the Court of Common Pleas criticised by Sugden in his edition of Gilbert on *Uses*, 274, 275, note.

⁶ 5 Taunt. 407, 408.

⁷ 5 Taunt. 413.

⁸ 5 B. & Ald. 801.

⁹ 5 B. & Ald. 805.

short certificate that the limitations over were bad.¹ Upon the hearing in Chancery it was urged on their behalf that it could not be collected from the certificate "whether the circumstance that the limitations were to take effect at the end of a term of twenty-one years, without reference to the infancy of the person intended to take, created such a suspense of the vesting as to render the limitations void;" but the Lord Chancellor said it was "impossible that the Court of King's Bench should not have considered that point," and confirmed the certificate, adding: "The inclination of my opinion is that the Court of King's Bench is right."² Mr. Justice Bayley, however, who signed the certificate, afterwards delivered the opinion of the judges in *Cadell v. Palmer*,³ and in that opinion said that the foundation of the certificate of the Court of King's Bench "was that a previous limitation, clearly too remote, and which was so considered by the Court of Common Pleas, made those limitations also void which the Common Pleas had held good. The subsequent limitations were considered as being void, not from any infirmity existing in themselves, but from the infirmity existing in the preceding limitation; and because that was a limitation too remote, the others were considered as being too remote also. Whether the Court of King's Bench gave any positive opinion on that, I am unable to say. I think the Court of King's Bench would have taken much more time to consider that point than they did, and have given it greater consideration than it received, if they had intended to differ from the certificate that had been given by the Court of Common Pleas; but when it became totally immaterial, in the construction they were putting upon the will, to consider whether they were or were not prepared to differ from the Court of Common Pleas, it is not to be wondered at that that point was not so fully considered as it might otherwise have been."⁴

§ 185. Mr. Justice Bayley may or may not have been right

¹ 5 B. & Ald. 814, 815.

³ 1 Cl. & F. 372.

² T. & R. 25.

⁴ 1 Cl. & F. 420, 421.

in his recollection of the ground of the certificate of the Court of King's Bench given eleven years before. But it seems clear that Sir William Grant and Lord Eldon were both inclined to agree with Lord Alvanley's opinion, expressed in *Thellusson v. Woodford*,¹ that a gross term of twenty-one years could not be taken in fixing the limits of remoteness; and the point was not settled until the case of *Bengough v. Edridge*;² s. c. in *Dom. Proc. sub nom. Cadell v. Palmer*.³ This case was argued in the fullest manner before Sir John Leach, V. C., and on appeal to the House of Lords, by Mr. Preston and Mr. Sugden. The Vice-Chancellor held,⁴ in 1826, that the term of twenty-one years could be taken without reference to the minority of anyone.⁵ In the House of Lords, in 1832, the judges were summoned, and eleven attended,⁶ and declared that the term of twenty-one years need have no reference to the minority of a devisee, nor, indeed, to any minority at all. The Lords, in accordance with this, affirmed the decree. Lord Brougham, C., moving the affirmance of the decree, said that the decision of the House in *Lloyd v. Carew* ⁷ "settled the rule."

11. *Extensions of the Rule not to be justified on Principle.*

§ 186. *Cadell v. Palmer*, of course, closed all controversy in England, nor does any question ever seem to have been made in America of the propriety of allowing a gross term. Certainly the allowance of a gross term of some length is highly convenient. But the result seems to have been arrived at by accident rather than by any process of judicial reasoning. In the *Duke of Norfolk's Case* ⁸ it was held that any limitation is good which must take effect within lives in being. Soon after this an attempt was made to extend the period beyond lives in being, but two of the most emi-

¹ 4 Ves. 227, 337; § 183, *ante*.

² 1 Sim. 173.

³ 1 Cl. & F. 372; 7 Bl. N. S. 202;

10 Bing. 140.

⁴ 1 Sim. 267.

⁵ See Sugd. Law of Property, 314.

⁶ 1 Cl. & F. 411.

⁷ Show. P. C. 137; § 178, *ante*.

⁸ 3 Ch. Cas. 1; § 169, *ante*.

nent lawyers of the time (indeed, with the exception of Sir John Holt, *longo intervallo* above their contemporaries), Lord Somers and Chief Justice Treby (assisted by Mr. Justice Rokeby), decided, in *Lloyd v. Carew*, that it could not be done. They were, however, overruled by a body of laymen.¹ Then came the case of *Stephens v. Stephens*,² where there was a gift on majority to the unborn child of a living person. The Court allowed the gift unwillingly, upon the authority of *Taylor v. Biddal*³ (a case decided before the *Duke of Norfolk's Case*, and of which the reports are inconsistent), and because there was no real restraint on alienation.⁴ And finally came *Cadell v. Palmer*,⁵ where a gross term of twenty-one years was allowed on the strength of *Lloyd v. Carew*.⁶

¹ Prec. Ch. 72, 106; Show. P. C. 137; § 178, *ante*.

² Cas. temp. Talb. 228; § 175, *ante*.

³ 2 Mod. 289; Freem. K. B. 243.

⁴ § 172, *ante*.

⁵ 1 Cl. & F. 372.

⁶ Lord Brougham, who gave the opinion in *Cadell v. Palmer*, subsequently more than once pointed out the illogical process by which the allowance of a gross term of twenty-one years was arrived at. *Cadell v. Palmer* "went, in my opinion, no further than at least one case of great authority, and decided in this House, though it may have gone further than the original reason of the rule authorized." *Tollemache v. Coventry*, 2 Cl. & F. 611, 624. "The Courts, and even this House, . . . have sanctioned what even plainly appeared to be erroneous principles, introduced and long assumed as law, rather than occasion the great inconvenience which must arise from correcting the common error,

and recurring to more accurate views. Accordingly, when *Cadell v. Palmer* was argued in this House, I advised that your Lordships should abide by the received extension which had for a great length of time been given to the period within which an executory devise might be held good." *Phipps v. Ackers*, 9 Cl. & F. 583, 598. "The rule of law is the term in gross of twenty-one years after the life or lives in being; that was clearly laid down by your Lordships upon my recommendation, after hearing the learned judges in the case of *Cadell v. Palmer*, and it is quite unnecessary to go back to the foundation of the law; I have a strong opinion, which I believe is joined in by the profession at large, that it arises out of an accidental circumstance, out of a confusion, I may say, a misapprehension in confounding together the nature of the estate with the remedy at law by fine and recovery, which could not be applied till a certain life came to twenty-one years." Dun-

§ 187. The true theory of the Rule against Perpetuities, so far as any artificial rule can be said to have a theory, is that no future interest must begin beyond lives in being. The question to be asked of any estate on condition precedent is: "When must the contingency happen, if at all?" But the mistake which is constantly recurring, and which has caused so much confusion, is that judges and legislators have considered, not when will the future estate begin, but how long will it be before an absolute fee can be conveyed.¹ That mistake occurred here; the judges did not consider when the future interest would begin; they considered how long it would be before a fee simple could be conveyed, and they said: "An executory devise may be postponed, it is conceded, to the end of a life estate. There can be no harm in extending the time till the person who takes the land on the termination of the life estate reaches twenty-one, for until he becomes of age he could not convey the land, even if there were no executory devise." This step the judges took, though unwillingly, in *Stephens v. Stephens*. And this is all for which they are really responsible. The allowance of a gross term can be traced to the unlearned peers overruling the sages of the law in *Lloyd v. Carew*.

§ 188. How unjustifiable was the step taken in *Stephens v.*

gannon v. Smith, 12 Cl. & F. 546, 629, 630. The rule that you can take a gross term "most clearly arises from a mistake. The law never meant to give a further term of twenty-one years, much less any period of gestation. The law never meant to say that there shall be twenty-one years added to the life or lives in being, and that within those limits you may entail the estate; but what the law meant to say was this: until the heir of the last of the lives in being attains twenty-one, by law a recovery cannot be suffered, and consequently the discontinuance of the

estate cannot be affected, and for that reason, says the law, you shall have the twenty-one years added, because that is the fact and not the law, namely, that till a person reached the age of twenty-one he could not cut off the entail. For that reason and in that way it has crept in by degrees; *Communis error facit jus*; and that rule never was applied more accurately than in *Cadell v. Palmer*." *Cole v. Sewell*, 2 H. L. C. 186, 233. See Lord St. Leonards, in *Sugd. Law of Property*, 315, 316; and Gilbert, *Uses* (*Sugd. ed.*) 260 *et seq.*, note.

¹ See §§ 278 *et seq.*, *post*.

Stephens is easily shown. Every reason which could be then urged for extending the period for creating an executory devise to a minority after a life in being could now be used for extending it to a minority after an absolute term of twenty-one years. Suppose a devise is made to such of the great-grandchildren of the testator living twenty-one years after his death as reach twenty-one. Until such great-grandchild reaches twenty-one he cannot convey his share: what harm, then, in extending the time till he reaches twenty-one? But such reasoning would not be considered valid now; it ought not to have been considered valid then. To take account of the disability of infancy in considering the validity of limitations is entirely contrary to the analogy of the law. An estate in fee simple or in tail may pass from infant to infant for centuries without being at any time alienable or barrable. In fact, the Rule, in its present shape, by which an arbitrary term of twenty-one years is taken, is less inconsistent with legal principle and analogy than it was to make the validity of the extension of the period for creating future interests depend upon the actual presence or absence of minority in a devisee.

12. *Any Number of Lives in esse Allowed.*

§ 189. Notwithstanding the statements in *Goring v. Bickerstaffe*¹ and *Love v. Wyndham*² that any number of lives in being might be taken to compose the period during which the creation of future estates would be lawful, Treby, C. J., is said, in *Luddington v. Kime*,³ to have been of opinion "that the time allowed for executory devises to take effect ought not to be longer than the life of one person then *in esse*." But in *Scatterwood v. Edge*⁴ the Court of Common Pleas is said to have agreed in holding that "the compass of a life or lives" was a reasonable time, "for let the lives be never so many, there must be a survivor, and so it is but the length of that

¹ Freem. Ch. 163, 166; § 163, *ante*.

² 1 Ld. Raym. 203, 207.

³ 1 Salk. 229; § 180, *ante*.

⁴ 1 Mod. 50, 54; 1 Sid. 450, 451; § 167, *ante*.

life." And Lord Hardwicke, in *Hopkins v. Hopkins*,¹ said: "It is not (in my opinion) material to restrain it to the life of tenant for life of the land, provided it be restrained to the life of a person in being."²

§ 190. Finally, in 1798, came the great case of *Thellusson v. Woodford*.³ A testator gave a large fortune to accumulate until all of his sons and grandsons and grandsons' children who were living at his death were dead, and then to be paid over. He left three sons and six grandsons him surviving. Lord Loughborough, assisted by Lord Alvanley, M. R., and Buller and Lawrence, JJ., held the gift over good, and the House of Lords, on the unanimous opinion of the judges, affirmed the decree. The eccentricity of the will and the large amount involved excited great interest in the case. The arguments were of the most elaborate character,⁴ and the judges did not conceal their dislike of the will, but no one of the many eminent lawyers who took part in the decision seems to have felt any doubt in the case.⁵

13. *The Connection of the Rule against Perpetuities with the Invalidity of Remainders for Life to Successive Generations.*⁶

§ 191. One point remains to be considered. It is sometimes said that there is a rule of the common law that you

¹ 1 Atk. 580, 596.

² See *Low v. Burron*, 3 P. Wms. 262, 265; 2 Harg. Jurid. Arg. 135, note (w); and *Humberston v. Humberston*, 1 P. Wms. 332; 2 Vern. 738; Prec. Ch. 455; Gilb. Eq. 128.

³ 4 Ves. 227; 11 Ves. 112.

⁴ The three days' argument of Mr. Hargrave against the validity of the executory devise was published by him in the second volume of his *Juridical Arguments*. It is an agreeable duty to recognize the debt which every student of the history of the Rule against Perpetuities owes to it.

⁵ Lord Eldon in his opinion said:

"It is well known that the late Chief Justice of the Court of King's Bench [Lord Kenyon] could hardly be brought to think any of the questions in this case fit for argument." 11 Ves. 144. See further on this matter, §§ 216 *et seq.*, *post*.

The history of the development of the law of future interests, and especially of the Rule against Perpetuities, is not the least valuable part of Mr. Lewis's valuable work.

⁶ See §§ 125-134, *ante*; §§ 284-298 *h*, App. K, § 931, *post*, which should be consulted in connection with this subdivision.

cannot limit legal remainders for life to successive generations, and that from this rule the Rule against Perpetuities is derived. The opposite is believed to be the case, and that the former rule is simply an instance of the latter. No suggestion of the rule that you cannot limit life estates in remainder to successive generations makes its appearance until the eighteenth century, long after the Rule against Perpetuities was firmly established. It has been alleged that the doctrine that you cannot limit a remainder to the issue of an unborn person is an instance of the doctrine that you cannot have a possibility upon a possibility. But this notion of a possibility upon a possibility was an innovation in the law, and was repudiated in the *Duke of Norfolk's Case*.¹ The only instance of an invalid possibility on a possibility, as given by Lord Coke, which is a remainder to the issue of an unborn person, is a remainder to the heirs of J. S. He says that if J. S. is born and dies during the particular estate, the remainder is void. But such a remainder takes effect, if at all, at the termination of the particular estate, and would be held good at the present day.² In fact, to say that you cannot give a remainder to the issue of an unborn person is not correct. On a gift to a man now unmarried for life, a remainder to his grandchildren is good. The true expression of the rule, even supposing it to be distinct from the Rule against Perpetuities, is that you cannot give successive contingent remainders for life. And that even such limitations were not considered bad until after the establishment of the Rule against Perpetuities, appears from the case of *Manning v. Andrews*.³

§ 192. That for a long time no question with regard to remoteness arose on remainders is not surprising. Remainder there could be none after an estate in fee simple; a remainder after a fee tail could be barred at will; a contingent remainder after a life estate could practically be barred by a fine, and

¹ 3 Ch. Cas. 1, 29. See §§ 125-133, *ante*.

² See *Routledge v. Dorril*, 2 Ves. Jr. 357, 366.

³ 1 Leon. 256, stated § 132, 132 *a*, *ante*.

no contingent remainder was good after an estate for years. The reason why so many cases of remoteness arose concerning executory devises and other conditional limitations is that they were indestructible. The destructibility of legal remainders prevented any question arising concerning their remoteness.¹

§ 193. The first case in which any question of the validity of successive remainders for life came before the courts was *Humberston v. Humberston*,² in 1717, more than thirty years after the doctrine of remoteness had been settled in the *Duke of Norfolk's Case*.³ "One Matthew Humberston (reported to have been formerly a Christ-Hospital Boy) devised his estate, which was very considerable, to the Draper's Company and their successors, in trust to convey the premises to his godson Matthew Humberston for life, and afterwards upon the death of the said Matthew to his first son for life, and so to the first son of that first son for life, etc., and if no issue male of the first son, then to the second son of the said Matthew Humberston for life, and so to his first son, etc., and in failure of such issue of Matthew, then to another Matthew Humberston for life, and to his first son for life, etc., with remainders over to very many of the Humberstons (I think about fifty), for their lives successively, and their respective sons, when born, for their lives, without giving an estate in tail to any of them, or making any disposition of the fee." Lord Cowper, C., said that an attempt to make a perpetuity for successive lives was vain. There is not a word about a possibility on a possibility.⁴

¹ The device of giving the freehold to trustees to preserve contingent remainders, and thereby preventing the tenant for life from destroying the contingent remainders, was not invented till the middle of the seventeenth century. *Garth v. Cotton*, 1 Dick. 183, 188, 191; 1 Ves. Sr. 524; 1 Jurid. Soc. Papers, 53-55.

² 1 P. Wms. 332; 2 Vern. 738; Prec. Ch. 455; Gilb. Eq. 128.

³ 3 Ch. Cas. 1.

⁴ Mr. Sweet is of opinion that the Lord Chancellor used "perpetuity" in the sense of an unbarrable estate tail. 1 Jarm. Wills (6th ed.) 283, note (n). This may well be. On the bearing of this suggestion upon Mr. Sweet's theory that the invalidity of remainders to successive generations is a result from the barrable character of estates tail, see App. K, §§ 943, 944, *post*.

§ 194. In *Hopkins v. Hopkins*¹ (1739) Lord Hardwicke said that he did not see how an estate could be devised to trustees and their heirs to hold until the birth of a son of a daughter of A., which daughter was unborn at the testator's death, and then to such son;² but there is nothing said about a possibility on a possibility, nor any indication that a different rule would apply in case of a remainder than in case of an executory devise; and indeed the gift to the daughter's son, if good, would have been an executory devise, and not a remainder.³

§ 195. The first suggestion to be found in the books that the doctrine of the invalidity of successive remainders for life is an independent original rule, and that the provisions of law concerning remoteness in conditional limitations have been copied from it, is to be found in Lord Keeper Northington's judgment in *Marlborough v. Godolphin*.⁴ In that case, decided by the Lord Keeper in 1759, there was a devise to trustees for the use of several persons for life, remainder to the use of their first and other sons successively in tail male, with a direction to the trustees on the birth of each of such sons to revoke the use to him, and limit the use to him for life, remainder to his first and other sons successively in tail male. Lord Keeper Northington held the direction void. He said: "It is agreed that the Duke of Marlborough could not have done this by limitation of estate; because, though by the rules of law an estate may be limited by way of contingent remainder to a person not *in esse* for life, or as an inheritance, yet a remainder to the issue of such contingent remainder-man as a purchaser is a limitation unheard of in law, nor ever attempted, as far as I have been able to discover. Why the law disallowed these kind of limitations I

¹ West, 606; 1 Atk. 580; 1 Ves. Sr. 268; Co. Lit. 271 *b*, Butler's note VII. 2. See Abbiss *v. Burney*, 17 Ch. D. 211; 70 L. T. 146.

² West, 629; 1 Atk. 596.

³ See Lewis, *Perp.* 413-415.

⁴ 1 Eden, 404; in *Dom. Proc. sub nom. Spencer v. Marlborough*, 3 Bro. P. C. (Toml. ed.) 232.

will not take upon me to say; because I have never met, in the compass of my reading, with any reason assigned for it: and I shall not hazard any conjecture of my own; for technical reasons upheld by old repute, and grown reverend by length of years, bear great weight and authority; but a new technical reason appears with as little dignity as an usurper just seated in his chair of state. So far, however, is plain, that the common law seemed wisely to consider that the real property of this state ought, to a degree, to be put in commerce, to be left free to answer the exigencies of the possessors and their families, and therefore admitted no perpetuities by way of entails; and though it allowed contingent remainders, it afforded them no protection.¹ . . . It was said in the argument on this case, that it is determined that a person may, by executory devise, make an estate unalienable for one life in being, and twenty or twenty-one years after, but that the time not to be exceeded is nowhere defined, therefore that I might as well extend it *beyond* that period, as others have *to* it. It is true that by executory devise an estate may be locked up for a life or lives in being, and twenty or twenty-one years after. And that is in conformity to the course of limitations, and the methods of conveyance at law; for a limitation may be to one for life, with remainder to a person unborn in tail or in fee. If there are trustees to support contingent remainders, the remainder cannot be barred by the tenant for life, nor can it be conveyed by the remainder-man till he attains the age of twenty-one. Therefore the sages of the law have properly allowed a perpetuity as far in executory devises, which are accommodated to the exigencies in families, as in legal limitations. . . . I have thus far considered this case upon its general tendency to a perpetuity, beyond what I conceive the rules of law allow.”²

§ 196. The case was carried to the House of Lords, and there affirmed in accordance with the unanimous opinion of

¹ 1 Eden, 415, 416.

the argument for the plaintiff, pp.

² 1 Eden, 418, 419. See, too, 408-411.

the judges.¹ In the argument of the counsel for the respondent it is said:² "If the grantor should, after the first vested estate of freehold, limit a contingent estate or use for life to a person unborn, and then follow it with contingent remainders in tail to the sons or children of such unborn tenant for life, such contingent limitations of the inheritance would be void. This arises from the policy of the law against perpetuities, that the vesting of the inheritance or ownership may not be suspended beyond the compass of a life or lives in being, or beyond the age of twenty-one of the first unborn tenant in tail, during whose infancy the law itself will restrain his power of alienation." Lord Northington seems to have regarded the rule against limiting successive life estates in remainder as an independent doctrine. He admits that he searched for the reason in vain, which is not strange, for no trace of such independent doctrine is to be found. He is the first to mention it. It is submitted that the statement of the counsel in the House of Lords, that the doctrine is a corollary of the Rule against Perpetuities, is not only more reasonable, but is historically correct.

§ 197. Lord Northington did not base the doctrine against successive life estates on any theory of the illegality of a possibility upon a possibility. We first find it referred to this theory in 1765, eighty years after it might have been hoped that such theory had, in the *Duke of Norfolk's Case*,³ received its quietus. *Chapman v. Brown*⁴ turned on special circumstances, but, with reference to a limitation to an unborn person for life, remainder to his issue in tail, Lord Mansfield, C. J., said: "A possibility cannot be devised upon a possibility;"⁵

¹ 3 Bro. P. C. (Toml. ed.) 232.

² Bro. P. C. (Toml. ed.) 245.

³ 3 Ch. Cas. 1.

⁴ 3 Burr. 1626; 3 Bro. P. C. (Toml. ed.) 269.

⁵ 3 Burr. 1634.

It is to this remark of Lord Mansfield that the revival of the

notion that a "possibility upon a possibility" was bad, was probably due, but the reputation of Lord Mansfield as a commercial lawyer should not blind us to the fact that he was not equally great in the law of real property. For instance, his decision on the Rule in Shelley's

and Wilmot, J., said: "You cannot limit a nonentity upon a nonentity, a possibility upon a possibility."¹ How little these phrases were understood as indicating the existence of any other reason than remoteness for the invalidity of such limitations is shown by the argument of counsel for the defendants in error before the House of Lords, where the case was carried and affirmed. They said that the intent of the testator "could not take effect; as it would establish a limitation of a possibility upon a possibility, and manifestly tend to a perpetuity, by a suspension of the inheritance from vesting, and consequently render the estate unalienable for a longer time than the policy of the law allows, which has not yet been suffered to continue longer than a life or lives in being, and twenty-one years beyond."²

Case in *Perrin v. Blake*, 1 W. Bl. 672, is now universally admitted to have been wrong. Again, his views of disseisin by election in *Taylor d. Atkyns v. Horde*, 1 Burr. 60, met a strong opposition from the profession. Butler's note to 1 Co. Lit. 330 b. Thus: "It is hardly possible to conceive on what principle of tenure the decision of *Taylor v. Horde* can be supported. And on recent occasions the courts have allowed that Lord Mansfield's doctrine in that case cannot be sustained," 1 Prest. Conv. 60; "it is lamentable to see how the law [of seisin and disseisin] is sometimes applied in practice to subjects which involve this learning; taking modern notions of convenience, and not principle, as the guide. The judgment in *Taylor v. Horde* has confounded the principles of law, and produced a system of error." 2 Prest. Abstr. (2d ed.) 289; cf. Challis, Real Prop. (3d ed.) 405, 406; Lightwood, Possession of Land, 43, 54; so, of Lord

Mansfield's decision in *Buckworth v. Thirkell*, 3 Bos. & P. 652, note, that an executory devise does not cut off curtesy and dower, it has been said that very few cases in modern practice have provoked so much discussion or been the subject of so much animadversion. 1 Scribner, Dower (2d ed.) 305.

¹ 3 Burr. 1635.

² 3 Bro. P. C. (Toml. ed.) 275.

In the first and second editions of *Fearne on Contingent Remainders* nothing seems to be said of remainders to an unborn child of an unborn person, for in the remarks on the "Nature of the Contingency upon which a remainder may be limited," he does not seem to have had them in mind; but in the third edition, published in 1776, on page 391, in the part treating of executory devises, he says: "Here, indeed, it may not be improper to remark, once for all, that any limitation in future, or by way of remainder of lands of inheritance, which in its nature tends to a per-

§ 198. In *Long v. Blackall*¹ (1797) Lord Kenyon, C. J., expressed himself more clearly even than Lord Northington. He said: "The rules respecting executory devises have conformed to the rules laid down in the construction of legal limitations, and the courts have said that the estate shall not be unalienable by executory devises for a longer term than is allowed by the limitations of a common-law conveyance. In marriage settlements the estate may be limited to the first and other sons of the marriage in tail, and until the person to whom the last remainder is limited is of age the estate is unalienable. In conformity to that rule the courts have said, so far we will allow executory devises to be good. To support this position I could refer to many decisions: but it is sufficient to refer to the *Duke of Norfolk's Case*, in which all the learning on this head was gone into; and from that

petuity, even although there be a preceding vested freehold, so as to take it out of the description of an executory devise, is by our courts considered as void in its creation;" and he then goes on to give the case of a remainder to an unborn person followed by a remainder to his children. Mr. Sweet, in a note to 1 Jarm. Wills (6th ed.) 369, note (j), thinks that "perpetuity" here probably refers to an unbarrable estate tail, but it seems more likely from the context that Mr. Fearne is referring to the Rule against Perpetuities.

In 2 Cas. & Op. 432, on Mr. Baker's will, in 1768, an opinion of Mr. Booth states, p. 435: "It is an error to say that an unborn son cannot be made tenant for life, . . . but a limitation to that unborn son's first son is a possibility upon a possibility; and that may be, and is by most lawyers thought to be, what the law will not en-

sure." In the opinion of Mr. Yorke, on the same will, p. 440, it is said: "By way of executory devise, or springing use, the inheritance may be suspended from vesting during a life or lives in being, or during the infancy of the first unborn tenant in tail; but it can be suspended no longer. In like manner a contingent remainder must vest during the life or immediately upon the death of the devisee of the particular estate which precedes it, such devisee being *in esse* at the time when the will speaks; but it cannot be made to wait or expect the vesting of another estate, prior in limitation, and equally contingent with itself. The law does not allow a contingency to depend upon a contingency, or one possibility to be thus raised upon another."

¹ 7 T. R. 100. See s. c. 3 Ves. 486, 489, and *Thellusson v. Woodford*, 11 Ves. 112, 150.

time to the present every judge has acquiesced in that decision. It is an established rule that an executory devise is good if it must necessarily happen within a life or lives in being and twenty-one years, and the fraction of another year, allowing for the time of gestation." This statement of Lord Kenyon, unsupported as it is by the facts, seems to be the chief ground of the common notion that the Rule against Perpetuities was borrowed from a rule forbidding the limitation of life estates in remainder to successive generations.

§ 199. In *Thellusson v. Woodford*¹ Mr. Justice Lawrence said: "The Court has no criterion to judge of the inconvenience arising from the restriction of property by executory devise except from contrasting it with the restraint which the common law allows to be put on the alienation of real property."² And Lord Alvanley, M. R.,³ and Chief Baron Macdonald⁴ say that Lord Nottingham, in the *Duke of Norfolk's Case*, declared that the rule as to the remoteness of executory devises was based on the rule which governed legal remainders.⁵ No such meaning can, however, be properly attributed to Lord Nottingham. What he says is that the same rule must govern the executory devise of a term as governs the executory devise of a fee: "Whenever you stop at the limitation of a fee upon a fee, there we will stop in the limitation of a term of years." But what rule shall govern the executory devise of a fee is, he says, "not yet determined."⁶ The chronological examination of the cases shows that the Rule against Perpetuities did not arise by way of analogy to any previous rule with regard to remainders, but that as questions of remoteness came up with regard to different classes of limitations they were considered, and the Rule against Perpetuities finally shaped as the rule which was to govern all cases.⁷

¹ 4 Ves. 227; 11 Ves. 112.

² 4 Ves. 314.

³ 4 Ves. 331.

⁴ 11 Ves. 135.

⁵ See Sir Edward Sugden's language, cited § 287, *post*.

⁶ 3 Ch. Cas. 36, 49; 2 Swanst. 468.

⁷ The case of *Whitby v. Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85, which held that there is a rule governing the creation of contingent

14. *The Rule against Perpetuities in America.*

§ 200. The Rule against Perpetuities, as part of the Common Law, has been carried to all the English colonies where the principles of that Law prevail.¹ Considering the unformed condition of the doctrine of remoteness at the time when the American Colonies were planted, it would have been quite possible for it to have developed there in a different shape from that which it assumed in England. But as a matter of fact the rule seems, in the absence of statute,² to be always adopted throughout the United States in its modern English form.³

§ 200 *a*. The practical importance of tracing the history of the Rule against Perpetuities lies in the proof it affords that the Rule is not confined, as has been sometimes contended, to interests arising under the Statutes of Uses and Wills, but that it was developed by cases on executory devises of chattels which were common-law interests, and that it should govern all kinds of future contingent limitations.⁴

remainders, independent of the Rule against Perpetuities, and the discussion which it has provoked, are dealt with, §§ 298 *et seq.*, *post*.

¹ See *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381. But cf. *Cooper v. Stuart*, 14 Ap. Cas. 286, 293.

² The statutory modifications of the Rule against Perpetuities are given in App. B and C, *post*. They are all in the direction of greater stringency.

³ See *Becker v. Chester*, 115 Wis. 90, 132; *Chilcott v. Hart*, 23 Color. 40. Cf. *Mayor of New York v. Stuyvesant*, 17 N. Y. 34, § 224, *post*.

The author's learned friend, Roland R. Foulke, Esq., of the

Philadelphia Bar, has called his attention to the fact that *Ashton v. Ashton*, 1 Dall. 4 (1760) in the Supreme Court of Pennsylvania, seems to be the first reported case in America in which a question of remoteness was involved.

⁴ See §§ 284–303, 312, 314–316, 319, 321, 323, *post*.

Mr. Charles Sweet in a note to *Challis*, Real Prop. (3d ed.) 211, admits that the Rule against Perpetuities is not confined to interests arising under the Statutes of Uses and Wills, but says that executory devises of terms were void at common law. That depends upon what is meant by common-law interests; see § 296 *a*, *post*. See also §§ 297–298, 299–302, *post*.

CHAPTER VI.

THE RULE AGAINST PERPETUITIES AND ITS COROLLARIES.

§ 201. IN the first edition the Rule against Perpetuities was given in this form: —

NO INTEREST SUBJECT TO A CONDITION PRECEDENT IS GOOD, UNLESS THE CONDITION MUST BE FULFILLED, IF AT ALL, WITHIN TWENTY-ONE YEARS AFTER SOME LIFE IN BEING AT THE CREATION OF THE INTEREST.

This appears to be correct if we assume that "condition" includes not only all uncertain future acts and events but also all certain future events with the exception of the termination of preceding estates.¹

If we decline to make this assumption, and confine "condition" to uncertain future acts and events, then the Rule against Perpetuities will take this shape: —

NO INTEREST IS GOOD UNLESS IT MUST VEST, IF AT ALL, NOT LATER THAN TWENTY-ONE YEARS AFTER SOME LIFE IN BEING AT THE CREATION OF THE INTEREST.²

¹ "Die Bedingungen, unter denen ja auch er [Savigny] nur diejenigen versteht, welche das Dasein eines Rechtsverhältnisses von einem künftigen ungewissen Ereigniss abhängig machen, und die Befristungen sind in der That nur Unterarten eines Begriffs, und zwar . . . Unterarten des richtig gefassten Begriffs der Bedingung." Adickes, *Die Bedingungen*, p. 60.

² Thus an estate devised to A. and his heirs, to begin from a day fifty years after the testator's

death, is too remote, although the event upon which it depends is certain to occur. On the distinction between vested and contingent interests, see Chap. III., *ante*. See also Lawrence's Estate, 136 Pa. 354, 366, 367.

The author's learned friend, Professor A. M. Kales, has criticised the latter definition on account of the ambiguous meaning of the word "vest." 20 Harv. Law Rev. 198; 5 Ill. Law Rev. 387. The advantage of using the term "vest"

1. *Nature of Interest.*

§ 202. The Rule governs both legal and equitable interests, and interests in both realty and personalty.¹

§ 202 *a*. The Rule applies not only to interests in particular pieces of property, but also to interests in changeable funds. Thus the interests of *cestuis que trust* may be too remote, although the trustees have full power to change investments.

§ 203. The Rule is not of feudal origin; it has its support in the practical needs of modern times. Therefore, although it is applied with great strictness, courts attend in applying it to the substance rather than to the form of future limitations. Thus a future interest, if destructible at the mere pleasure of the present owner of the property, is not regarded as an interest at all, and the Rule does not concern itself with it. For instance, such limitations after an estate tail as must take effect, if at all, not later than the termination of the estate tail, are never too remote; the present tenant in tail can destroy them all at any moment by docking the entail.²

§ 204. In like manner, rights of escheat in realty and in the nature of escheat in personalty are not within the Rule. These rights in modern times are always in the Crown or State, and their existence in no degree affects the value of the interests which are subject to them.³

is that the word, as employed in connection with the Rule against Perpetuities, implies the assumption made with regard to the definition first above given and without which that definition is incomplete. It is true that the artificial character of the term "vested" as applied to a remainder to an increasable class asks for an explanation, but it seems better to give this explanation separately,

as is done in §§ 205 *a*, 205 *b*, *post*, than to incumber the definition with it. See §§ 110 *a*, 118, *ante*, App. M, § 970, *post*.

¹ Lewis, Perp. 169. The interests subject to the Rule are fully discussed in Chap. VIII., *post*. See *In re Walkerly*, 108 Cal. 627, 657.

² See Chap. XIV., *post*.

³ See also note to the next section.

2. *Vested Interests not subject to the Rule.*

§ 205. A vested interest is not subject to the Rule against Perpetuities.¹ Thus, if land is devised to A., now a bachelor, for life, remainder to his children, as tenants in common, for life, remainder to B. in fee, B.'s remainder is vested, and is not too remote, although it may not come into possession until a period beyond the limits of the Rule against Perpetuities. Reversions and vested remainders, and those equitable in-

¹ See § 101, *ante*.

In *Wood v. Drew*, 33 Beav. 610, the testator bequeathed five leasehold houses, the leases of which had about fifty-four years to run, in trust for A. for life, remainder for her children; and on the expiration of the lease of any house he directed his trustees to convey to A. for life, remainder to her children in fee, one or more of his five freehold houses, so that the house thus conveyed should be of equal annual value, as near as could be, but not exceeding, the annual value of the leasehold house; and in case the annual value of the freehold house or houses should exceed the annual value of the leasehold house, then the difference should be paid by A. or her children to his trustees, upon the trusts of the will. The freehold houses were given to the trustees on trust to convey them, or such of them as might be necessary, to A. and her children, as provided, and until such conveyance to hold said houses, and all other the testator's property, in trust for B. and his heirs. Sir John Romilly, M. R., held that the interest of A. and her children in the freehold houses was not void for remoteness; that if it was bad for any

cause it was bad for uncertainty; and he held that it was not bad for uncertainty. But the uncertainty seems to be this, — until remote periods it cannot be told which freehold house or houses will be conveyed in lieu of each leasehold house, or what the annual value of such houses will then be; that is, the uncertainty arises from the doubtfulness of a remote contingency. The objection is that of remoteness, and it is submitted that the gift was too remote. Apparently the annual value of the leasehold house for which a freehold house or houses of equal annual value was to be exchanged was the value at the expiration of the lease. Now, even assuming that the five freehold houses, less the amount by which their value should exceed the value of the leasehold houses at the expiration of the leases, could be considered as a distinct entity, and that this entity if ascertained could vest at once; yet such entity could not be ascertained until the leases fell in, and must consequently be contingent and therefore too remote. Cf. *Re Wood*, [1894] 2 Ch. 310, 316; *In re Bewick*, [1911] 1 Ch. 116.

terests and interests in personalty which, if they were legal interests in realty, would be reversions and vested remainders, are vested interests. Other future interests are not vested.¹

¹ The right of escheat, if an interest at all within the purview of the Rule against Perpetuities, is a vested interest. At any rate, it has no effect on the tying up of property. §§ 115, 204, *ante*.

The right of escheat in real property is a future right; but when the Crown or State takes personal property upon the owner dying intestate and without kin, it takes, perhaps, as *ultimus heres*, that is, as continuing in succession the original owner's right. *In laico autem decedente ab intestato, deficientibus consanguineis et uxore, succedet fiscus*. Lyndwood, Prov. 180. "Suppose Lowe had been a bastard, or, being legitimate, had died without any next of kin, The King, in such case, would have taken, as *ultimus heres*, but subject to the debts of the intestate." *Per* Lord Mansfield, *Megit v. Johnson*, 2 Doug. 542, 548. Cf. *Dyke v. Walford*, 5 Moore, P. C. 434.

In the famous case of *Burgess v. Wheate*, 1 Eden, 177, it was held that when the owner of an equitable fee dies without heirs, the trustee does not hold the land subject to a trust for the Crown, and, in spite of Lord Mansfield's dissenting opinion, and of much criticism to which the decision has been subjected, this seems correct. When a man dies without natural heirs, the lord takes the land, not in succession as *ultimus heres*, but in the *post* by reason of tenure, and there is no tenure of an equitable fee. The legal title is in the trustee subject

to a trust in favor of the *cestui que trust*, and this trust has come to an end, and as it was not held of any lord, there is no person remaining having any claim against the trustee.

The contention may be made, that although the Crown cannot take as lord upon the death of the *cestui que trust* without heirs, there should be a resulting trust to the settlor or testator and his heirs. This question has not been presented in the cases, for in them the *cestui que trust* was the settlor or testator, so that not only the *cestui que trust*, but also the settlor or testator had died without heirs, and there was no one to whom a trust could result. *King's Attorney v. Sands*, Freem. Ch. 129. *Burgess v. Wheate*, 1 W. Bl. 123. *Henchman v. Attorney-General*, 3 Myl. & K. 485. *Taylor v. Haygarth*, 14 Sim. 8. *Davall v. New River Co.*, 3 De G. & Sm. 394. *Beale v. Symonds*, 16 Beav. 406. *Cox v. Parker*, 22 Beav. 168. *Re Harrop's Estate*, 3 Drew. 726. *Sweeting v. Sweeting*, 33 L. J. Ch. 211. *Gallard v. Hawkins*, 27 Ch. D. 298. See also *Anon.*, 5 Edw. IV. 7, pl. 18; *Anon.*, 2 And. 197, 200; *Henchman v. A. G.*, 3 Myl. & K. 485. The case of *Keogh v. M'Grath*, 5 L. R. Ir. 478, seems to be the only exception. Cf. the St. 47 & 48 Vict. c. 71, § 4, giving the trust to the Crown; *Re Wood*, [1896] 2 Ch. 596; and an article on the Law of Escheat by Mr. Frederic W. Hardman, 4 Law Quart. Rev. 418.

§ 205 *a*. The preceding statement must be subjected to one qualification. When a remainder is given to a class, and such re-

If land is devised to trustees in trust for A. for life, and then in trust for A.'s children in fee, and A. never has any children, there is upon A.'s death a resulting trust to the testator's heirs; why then, it may be said, if land is devised to trustees in trust for A. and his heirs and A. dies without heirs, should there not be a resulting trust to the testator's heirs? It may be answered that in the former case the trust to A.'s children never arises, while, in the latter, though it has come to an end, it did once exist; but this does not seem a very solid distinction. Again, as we shall see (§ 603 *i*, *post*), when land is devised for a charitable purpose which comes to an end, and cannot be executed *cy pres*, there is a resulting trust; and this may be said to present the same case as a death without heirs. Here again it may be answered there is a distinction between a charitable purpose and an individual *cestui que trust*, but this too seems a rather unsubstantial difference. On the whole, in a jurisdiction where the common law still prevails, if A. devises property in trust for B. and B. dies without heirs, it may be worth considering whether there should not be a resulting trust to A.'s heirs. There seems to be nothing in the authorities (except the Irish case) to prevent it.

For the cases in those of the United States where there is no tenure, and where, therefore, there can be no escheat, properly so called, *vide infra*.

If personal property is held in trust for A. and A. dies intestate and without widow or kin, the trust continues in favor of the Crown. As with real estate, in all these cases the *cestui que trust* who has died without kin has been the same person as the settlor or deviser, and therefore there could be no question of resulting trust. *Taylor v. Haygarth*, 14 Sim. 8. *Powell v. Merrett*, 1 Sm. & G. 381. *Cradock v. Owen*, 2 Sm. & G. 241. *Re Harrop's Estate*, 3 Drew. 726. *Read v. Stedman*, 26 Beav. 495. *Re Hudson's Trusts*, 52 L. J. Ch. 789. *Dillon v. Reilly*, 9 L. R. Ir. 57.

Suppose, however, that A. bequeaths personal property to B. in trust for C. and C. dies intestate and without wife or kin, should the Crown or State take? This seems to depend upon whether the Crown or State is really *ultimus heres* or not. If the Crown or State is really *ultimus heres*, that is, if it takes *in succession* to the deceased owner, then it will succeed to the trust; if, on the other hand, *ultimus heres* is merely a piece of rhetoric, then either the trustee should take free from trust, or there should be a resulting trust to the next of kin of the testator as explained above with reference to real estate.

Where there is no tenure, and therefore no escheat, the passing of real estate on the death of the owner without heirs, would, in the absence of Statute, seem to rest upon the same principles as underlie the passing of personal property. See *Matthews v. Ward*, 10 G. & J. 443; and

mainder is vested in certain members of the class subject to open and let in other members, born afterwards or afterwards fulfilling a condition,¹ the shares in such remainder or interest may be obnoxious to the Rule against Perpetuities, because their number and therefore their size may not be determinable until too remote a period.² For instance, suppose land is devised to A., a bachelor, for life, remainder to his eldest son for life, remainder to those children of B. who reach twenty-five. At the testator's death B. is living and one of his children, C., has reached twenty-five. The interest of C. is said to be vested, and yet the devise to B.'s children is invalid as too remote; for, although the minimum size of each child's share will be fixed at the death of B., the maximum may not be determined until twenty-five years after.³ This qualification is rendered necessary by the artificial character of the rule which declares that a member of a class may have a vested interest in property given to the class, although the number of the members in the class is uncertain. The fact is that, though it is certain that each member of the class will get something, the amount which he will get is dependent upon the contingency of the size of the class. Though the interest is called vested, it is in truth contingent.⁴

§ 205 *b*. A *dictum* in the case of *Belfield v. Booth*⁵ seems to have overlooked this qualification. The Court in that case held that the period at the end of which distribution was to

cf. *Johnston v. Spicer*, 107 N. Y. 185; and *Commonwealth v. Naile*, 88 Pa. 429.

Where there is an escheat, or the extinguishment of a trust, or a succession in interest, there is no room for the application of the Rule against Perpetuities; as to its application to cases of resulting trust, see § 327 *a*, *post*.

¹ See §§ 110, 110 *a*, *ante*.

² See Chap. X., Limitations to Classes, *post*.

³ See §§ 381-385, *post*.

⁴ § 110 *a*, *ante*. 1 Jarm. Wills (6th ed.) 329. 30 Cyc. Law & Proc. 1486. See *Re Gage*, [1898] 1 Ch. 498; and § 972, note 7, *post*.

As to the cases in which the right of possession of a vested interest is allowed to be postponed, and the application to them of the Rule against Perpetuities, see Chap. IV., *ante*.

⁵ 63 Conn. 299, 306.

take place would not extend beyond the limit fixed by the Rule against Perpetuities,¹ but they said: "Even if the period were one that might endure to a time beyond twenty-one years after the decease of the testator, the estate having vested at his decease in a definite class cannot be divested by any change in the membership of that class. It remains the same class, though composed from time to time of different individuals." It is respectfully submitted that this *dictum* is incorrect.

§ 206. An estate which, though now a contingent remainder or executory devise, must, if it is to take effect at all, become vested within twenty-one years after lives in being, is good. Thus upon a devise to A. in fee, but if she dies unmarried then to B. and the heirs of her body, and on failure of them to C. and the heirs of her body, C.'s estate, though at the death of the testator an executory devise, would be turned into a vested remainder by the death of A. unmarried, and is therefore not too remote.² But the estate must vest within the required limits; it is not enough that it will vest during or at the end of a life interest which is itself good as beginning within them.³ So there can be successive gifts for life to persons unborn, provided their estates must vest within the required limits.⁴

¹ See § 214 *b*, *post*.

² *Craig v. Stacey*, Ir. Term R. 249. See *Re Roberts*, 19 Ch. D. 520. If property is held in trust, on the termination of twenty-one years after a life in being, to transfer and pay over the same, the gift over is not too remote, although it may take some time for the trustees to make the actual transfer and payment. *Bates v. Spooner*, 75 Conn. 501.

³ *Hodson v. Ball*, 14 Sim. 558, 574. *Lett v. Randall*, 3 Sm. & G. 83. *Buchanan v. Harrison*, 1 J. & H. 662, 665. *D'Abbadie v. Bizoin*, Ir. R. 5 Eq. 205. See *Re Merri-ck's Trusts*, L. R. 1 Eq. 551;

Goodier v. Johnson, 18 Ch. D. 441; *Goodier v. Edmunds*, [1893] 3 Ch. 455; §§ 509 *b*, 509 *d*, *post*.

⁴ *Brudenell v. Elwes*, 1 East, 442; *Cadell v. Palmer*, 1 Cl. & F. 372; 7 Bl. N. s. 202. The *dictum* of Lord Tenterden, C. J., in *Doe d. Garrod v. Garrod*, 2 B. & Ad. 87, 96, to the contrary is not law. See *Marsden, Perp.* 180. On the question whether a remainder for life to the child of an unborn person, after a remainder for life to such person, is good, if so limited that it must take effect within lives in being and twenty-one years, see §§ 284 *et seq.*, *post*.

§ 207. In *Ashley v. Ashley*¹ an estate was given to A. for life, remainder to A.'s children as tenants in common for life, and for want of such issue remainder over. It was held that cross-remainders for life to the children of A. should be implied. Malins, V. C., in *Stuart v. Cockerell*,² and Mr. Marsden,³ find fault with this decision on the ground that such cross-remainders would be too remote. But the criticism seems not just. The cross-remainders all vested not later than the death of A.⁴ The case is unlike a gift to the children of A. as tenants in common for life, remainder to the survivor in fee. There the remainder is contingent until all the tenants but one are dead.⁵

§ 207 a. In *Cooke v. Bowler*⁶ property was given in trust for the benefit of the testator's brother, A., and his sisters, B., C., and D., for life, then for their children for life, "with benefit of survivorship," and on the death of the survivor then to be distributed in accordance with the Statute of Distributions. Lord Langdale, M. R., is said to have held that the direction for distribution was void for remoteness, and that the property went, as on intestacy, to those who were the testator's next to kin at his death. The opinion is very brief. This case has been sometimes referred to as an authority that a vested interest is too remote if preceded by a life estate to an unborn person. But if the distribution to the next of kin was construed to mean a distribution to those who should be the next of kin at the termination of the children's life estates, the persons to take would remain uncertain until such termination, and the gift to them would be contingent, and of course too remote; while if the gift was vested, it vested in those who were next of kin at the testator's death, and they were the persons who did in fact take.⁷

¹ 6 Sim. 358.

² L. R. 7 Eq. 363, 370.

³ Perp. 177 *et seq.*

⁴ See 1 Jarm. Wills (6th ed.), 349.

⁵ On the case where the re-

mainder is to joint tenants for life, see § 232 a, *post.*

⁶ 2 Keen, 54.

⁷ See 1 Jarm. Wills (6th ed.) 349; Lewis, Perp. 218 (a). Mr. Marsden suggests, Perp. 179, 180,

§ 208. In *Donohue v. McNichol*¹ after the devise of a life estate to an unborn person, there was a gift over to the testator's heirs. The Supreme Court of Pennsylvania said that even if the gift over was to those persons who were the testator's heirs at his decease, it would be too remote, and questioned 1 Jarm. Wills, 240.² As the same persons took whether the gift over so construed was valid or not, the remarks were not called for. They seem to have been clearly erroneous.³

§ 209. If a remainder is vested, that is, if it is ready to take effect whenever and however the particular estate determines, it is immaterial that the particular estate is determinable by a contingency which may fall beyond a life or lives in being. For instance, if an estate is given to the unborn child of A. until he dies or changes his name, and then to B. and his heirs, B. has a vested remainder, for he will take the estate whether the child dies or changes his name, although the contingent determination of the estate before the child's death depends upon an event which may not take place until beyond the limits prescribed by the Rule against Perpetuities.⁴ And it makes no difference whether the provision for termination be expressed in the form of a condition or a limitation.⁵ So a remainder to a person ascertained and his heirs after a term for years, however long the term, or whatever be the conditions to which the term is subject, is not too remote.⁶

that perhaps *Cooke v. Bowler* is to be explained on the ground that the ultimate gift was bad as coming after cross limitations for life to nephews and nieces which were themselves too remote. As to this, see §§ 251 *et seq.*, *post*.

¹ 61 Pa. 73.

² 6th ed. 349.

³ See Foulke, Treatise, § 348; § 353 *a*, *post*.

⁴ *Wainwright v. Miller*, [1897] 2 Ch. 255. See *Boughton v. James*, 1 Coll. 26, 46; *Re Gage*, [1898] 1 Ch. 498; *Lawrence's Estate*, 136 Pa.

354, 367; *In re Stevens*, [1912] Vict. L. R. 194; App. M., §§ 970 *et seq.*, *post*.

⁵ See *Re Roberts*, 19 Ch. D. 520; *Marsden*, Perp. 71, 176, 177; *Lewis*, Perp. 173.

⁶ *Gore v. Gore*, 2 P. Wms. 28. *Wood v. Drew*, 33 Beav. 610. *Switzer v. Rochford*, [1906] 1 I. R. 399. *Fearne*, C. R. 431. *Marsden*, Perp. 65. *Challis*, Real Prop. (3d ed.) 186. See *Redington v. Browne*, 32 L. R. Ir. 347, 356; *Todhunter v. D. M. I. & M. R. Co.*, 58 Iowa, 205; *Toms v. Williams*, 41 Mich. 552, 572; *Rhodes's Estate*, 147 Pa.

§ 209 *a*. In *Morris v. Fisher*¹ the Court of Common Pleas of Philadelphia held that a vested remainder after a term for ninety-nine years was too remote, and in ejectment by the heir of the remainder-man judgment was given for the defendant. The case was carried to the Supreme Court of Pennsylvania, and there the parties joined in an agreement requesting the Court to reverse the judgment below, which was done.² This looks as if the learned counsel for the defendant had little hopes of holding his judgment. It does not seem possible that he could;³ or that a like decision of the United States Circuit Court for the Western District of Arkansas can be sustained.⁴

§ 210. There can be no remainder after a fee simple; a remainder after a fee tail is destructible; a remainder after life estates must vest in possession not later than the end of life estates which begin within the limits of the Rule against Perpetuities; but an estate subject to a term for years may not come into possession for centuries. Here there seems an opportunity for abuse. If an estate is devised to A. and his heirs, but if he or they ever change their family name, then to B. and his heirs, the gift to B. is an executory devise, and is too remote. But suppose an estate is devised to A. for a thousand years unless A. or his heirs sooner change their name, and, subject to the term, the land is devised to B., here B. has an interest theoretically vested, but practically contingent upon A. or his heirs changing their name, — an event which may be very remote. The trouble arises from terms being sometimes of extravagant length. Some legislation, like that of Alabama,⁵ which provides that “no leasehold estate can be created for a longer term than twenty years,” seems judicious.⁶

227; *Sioux City Terminal R. R. Co. v. Trust Co. of N. America*, 82 Fed. Rep. 124.

¹ 8 Pa. Dist. Rep. 161.

² 46 Atl. Rep. 1102.

³ See Foulke, *Treatise*, § 363.

⁴ *Hanley v. Kansas Coal Co.*, 110 Fed. Rep. 62.

⁵ Civil Code (1907), § 3418.

⁶ See *Roe v. Galliers*, 2 T. R. 133, 140; 3 Prest. Abs. (2d ed.) 154, 155; 4 Property Lawyer, 297, 298; Gray, *Restraints on Alienation* (2d ed.), § 103; App. M, §§ 970 *et seq., post*. Statutes limiting the duration of terms for years have

3. *Nature of Contingency.*

§ 211. The contingencies on which future interests may be conditioned are infinite in number. The one most in controversy has been the failure of issue. If a gift is made upon a failure of A.'s issue, the point to be determined is whether an indefinite failure of issue or a failure at A.'s death is intended. If the former, then it is meant that the gift over shall take effect whenever A.'s issue come to an end, even in the remotest generation. If the latter, then it is meant that the gift over shall take effect only in case A. has no children living at his death. For instance, suppose there is a gift to A. and his heirs with a gift over upon the death of A. without issue, and A. dies leaving a son B. surviving him, but B. dies unmarried, here, if an indefinite failure of issue is intended, the gift over is meant to take effect, for A.'s issue have become extinct; but if a definite failure of issue is intended, then the gift over is not meant to take effect, for A. left issue him surviving.

§ 212. In the case supposed, if the gift is of real estate the decision of the question whether a failure of issue is definite or indefinite is immaterial, so far as remoteness is concerned; for if an indefinite failure of issue is intended, then the first taker has an estate tail, to remainders on which the Rule against Perpetuities does not apply; and if a definite failure is intended, then the gift over takes effect on the death of the first taker.¹ In the case of personal estate the question of indefiniteness or definiteness of failure of issue is vital on the question of remoteness; for if the failure of issue be indefinite, the gift over is too remote, while if it is definite, the gift over is of course good.²

been passed in other States; e. g. California, Civil Code, §§ 717, 718; Nevada, Comp. Law (1900), § 2717, Gen. Sts. (ed. 1885), § 2647; North Dakota, Rev. Codes (1905), § 4746.

¹ If there is no preceding gift to

A., then a gift over of real estate on failure of A.'s issue will, on the question of remoteness, follow the analogy of limitations of personalty.

² A definite failure of a man's issue is not necessarily a failure at his death; a failure in any partic-

§ 213. "Dying without issue" and equivalent expressions are presumed at the common law to mean an indefinite failure of issue, but this presumption can be overthrown by the context; and by statute in England¹ and in many of the United States the presumption is, in devises and bequests, reversed. The number of cases is enormous. Mr. Lewis has devoted almost a third of his treatise to their consideration; but, with all respect for his authority, the discussion, however learned and valuable, seems out of place. There is no doubt how the Rule against Perpetuities applies either to gifts on indefinite or on definite failure of issue. Which is meant is a mere question of construction, and its discussion belongs to a treatise on the construction of wills, rather than to one on the Rule against Perpetuities.²

4. *The Contingency MUST happen, if at all, within the Required Limits.*

§ 214. It is not enough that a contingent event may happen, or even that it will probably happen, within the limits of the Rule against Perpetuities; if it can possibly happen beyond those limits, an interest conditioned on it is too remote.³ A good illustration is furnished by a mistake which has been often made. Property is devised to A. for life, remainder to his widow for life, remainder over on the death of the widow. Here the remainder over on the death of the widow, if contingent until

ular generation or generations of his descendants is equally definite. Whether such gift would be too remote can easily be determined. Practically the question always arises between a definite failure at his own death, and an indefinite failure in any generation.

¹ 1 Vict. c. 26, § 29.

² The learned reader will find the cases collected and discussed in Lewis, Perp. c. 15, pp. 174-407; Suppl. pp. 68-96; Prior, Lim.

§§ 97-171; 2 Jarm. Wills (6th ed.) p. 1958; Hawkins, Wills, (2d ed.) c. 17, 254-264; Theob. Wills (5th ed.), c. 42, pp. 619-625; Tud. L. C. in Real Prop. (4th ed.) 371; Marsden, Perp. c. 10, pp. 182-205. See § 632, *post*.

³ See *Re Wood*, [1894] 2 Ch. 310; [1894] 3 Ch. 381; *Re Stratheden*, [1894] 3 Ch. 265; *Thomas v. Thomas* (C. A.), 87 L. T. R. 58. *In re Bewick*, [1911] 1 Ch. 116. Cf. *Gex v. Dill*, 86 Miss. 10.

that event, is bad, because A. may marry a woman who was not born at the testator's death; and the result is not affected by the fact that A. is very old at the testator's death.¹

§ 214 a. In *Brandenburgh v. Thorndike*² a testator gave the residue of his property to trustees, in trust from the income to pay to his wife a certain sum annually, to add the balance to the capital, and after the death of the wife to add the whole income to the capital, and directed that "at the expiration of three years from the death of my wife, or at such time, whether earlier or later, as may, in the discretion of the trustees, be found expedient and practicable for the final settlement and distribution of my estate, the trustees shall pay, convey, and transfer said fund in equal shares, viz. one share to each of my following nieces and nephew, then surviving" (naming them) "and one share to the issue of each of said nieces and nephew then deceased leaving issue then surviving." The court held that the gift to the nieces and nephew and their issue was not too remote. They said: "Taking the view most favorable to the plaintiffs, the discretion of the trustees to delay the payment after the expiration of the three years is limited to such time as is reasonably necessary to settle the estate. They could not delay longer without violating their duty, and in case of unreasonable delay they would be compelled by a court of equity to make the payment and transfer. In no contingency could it be necessary or reasonable to delay the settlement and distribution of the estate for twenty-one years after the death of the widow."

§ 214 b. In *Belfield v. Booth*³ the will of a testator, who died in 1890, after making certain bequests and charges, continued thus: "After the above bequests have been complied

¹ *Hodson v. Ball*, 14 Sim. 558, 574. *Lett v. Randall*, 3 Sm. & G. 83. *Buchanan v. Harrison*, 1 J. & H. 662. *In re Harvey*, 39 Ch. D. 289. *Sears v. Russell*, 8 Gray, 86. *Stone v. Nicholson*, 27 Grat. 1. See *Merrick's Trusts*, L. R. 1 Eq.

551; *Goodier v. Johnson*, 18 Ch. D. 441; *Stephens v. Evans*, 30 Ind. 39; *Klingman v. Gilbert*, 90 Kans. 545; *Marsden, Perp.* 103, 175.

² 139 Mass. 102.

³ 63 Conn. 299.

with and the executor has settled with the judge of probate, my will is that the remainder of my estate be paid over to the trustee hereinafter named. I hereby appoint" P. "trustee of my estate for the following fourteen years from the time he receives said funds from the executor." The testator proceeded to direct that the trustee should make certain annual payments during the fourteen years, and at the expiration of that period should cause the remainder to be divided among a class to be then determined. P. was also named as executor. P. had been removed by the Court of Probate from his office as executor, but had appealed. He had not settled his administration account, and the date of the final settlement of the estate (which was mainly personalty) was uncertain on account of the pendency of the appeal. The Supreme Court of Errors of Connecticut held that the fourteen years began to run from the date of the settlement of the administration account, and they held that the period for final distribution was not too remote.¹ The Court said that the settlement of the estate of a deceased person in Connecticut was ordinarily completed within one or two years; that the executor was bound to offer the will for probate within thirty days from the testator's death; that "the form of probate bond, long prescribed by statute, obliged the executor to render his final account at a day set by the court, generally within a year from the grant of letters testamentary;"² that twelve months was the longest period that could be fixed by the probate court for the presentation of claims, and suits upon rejected claims must be brought promptly if at all; that if an executor neglected to settle an estate within a reasonable time, the court of probate could remove him on summary proceedings; that "the testator has a right to rely on the courts of his

¹ As to a *dictum* in the opinion, seemingly erroneous, on a vested gift to a class which can be increased and diminished, see § 205 *b*, *ante*.

² The statute in force at the date of the will and subsequent proceedings did not, however, prescribe the form of the executor's bond. Conn. Gen. Sts. (1888), § 548.

State to enforce the proper settlement of his estate, both as to the manner and the time of the proceeding;" that the executor "has been removed for cause, and within two months thereafter the construction of his [the testator's] will has been brought before the court of last resort for final determination;"¹ that the pendency of the executor's appeal from the decree of removal, although it rendered the time of the final settlement of the estate uncertain, could not render it remote, since such an appeal takes precedence of ordinary actions; that the Court was not to presume that the settlement of the estate will or can be delayed beyond a reasonable time; and that its opinion was that the trust would "commence at the time when the accounts of the executor or administrator of his estate are, or should be, settled in the due course of administration, and that this time cannot be delayed so long as seven years from his decease;" that it was "not necessary that such settlement should be the final accounting of the executor or administrator in the court of probate;" and that some of the persons to whom annual payments were to be made were over eighty.

§ 214 c. The cases of *Brandenburgh v. Thorndike* and *Belfield v. Booth* call for serious consideration. The decision in the former case seems correct. A fair construction of the will was that the testator by the expression, "at the expiration of three years from the death of my wife, or at such time, whether earlier or later, as may, in the discretion of the trustees, be found expedient and practicable," meant "at such time, about three years, as the trustees may determine," and certainly a period exceeding twenty-one years is not "about three years." The decision in *Belfield v. Booth* is harder to support. That case rests upon the proposition that a period of fourteen years to begin after "the executor has settled with the judge of probate," must begin within seven years from the testator's death. Now, in the first place, the substitution of the time when the executor *should* have settled his accounts for

¹ The case was argued before June, 1893, and decided in September, 1893.

the time when he has in fact settled them, seems a straining of the words of the will. But further to say that an executor ought necessarily, as matter of law under all circumstances, to settle his accounts within seven years after the testator's death seems to be to lay down doctrine which it is difficult to maintain. Suppose a man dies testate leaving a large property but much involved; suppose some of his relations are dissatisfied with his will; suppose plan after plan of compromise is tried in vain; suppose the will is offered for proof, an appeal taken to a jury from the decision in the probate court, an appeal to the Supreme Court on a question of the admissibility of evidence, and the appeal sustained; a new trial before a jury; a new appeal again sustained; the same process repeated a third time; suppose the will finally allowed, but that most of the assets are claimed by a third person, and the executor is obliged to prosecute or defend lawsuits in order to hold the assets and that these suits have the common incidents of appeals and new trials; suppose that the will is obscure, and a bill in equity has to be brought to construe it. None of these suppositions are impossible, few are improbable. Many other suppositions, neither impossible nor improbable, might be imagined. Between them it is certainly possible that the executor may not be bound in law to settle his accounts till more than seven years have elapsed since the death of the testator. Or if such delay is absolutely impossible in the *Saturnia regna* of Connecticut, the case can hardly be an authority in jurisdictions where justice is not so speedy.

§ 214 *d.* The case of *Belfield v. Booth* is an interesting illustration how the introduction or rejection of a legal doctrine may bring about unexpected consequences. Connecticut repudiated the doctrine of *cy pres*; then came the case of *Coit v. Comstock*,¹ easily to be decided under the doctrine of *cy pres*, but for which the Court, to preserve the form of consistency, had to invent several novelties, among others this implication of "reasonable time," to avoid the objection of remote-

¹ 51 Conn. 352; see §§ 621-624, *post*.

ness; and from *Coit v. Comstock*, this idea has travelled to *Belfield v. Booth*, and is there no longer confined to charities.¹

§ 214 *e*. To avoid any doubt as to the points raised in these cases, the periods within which powers given by will to executors or others, e. g. to sell real estate, are to be confined, should be made to run, not from the date of probate, but from the time of the testator's death.

§ 215. In one class of cases, from the difficulty and delicacy of determining the question involved, the occurrence of a contingent event beyond the required limits will be considered as possible although it is physically impossible. If a devise is made to those of a woman's children who reach twenty-five, the gift is too remote, although the woman be of such an age that it is certain she can have no more children, and therefore the event must occur, if at all, in the lives of persons in being, viz., of her children alive at the testator's death. In other words, for the purpose of determining questions of remoteness, men and women are deemed capable of having issue as long as they live. This was held by Sir Lloyd Kenyon in *Jee v. Audley*,² and his decision has never been questioned.

§ 215 *a*. In *Sayer's Trusts*,³ Malins, V. C., followed *Jee v. Audley*; but in *Cooper v. Laroche*,⁴ apparently forgetting both *Jee v. Audley* and his own previous decision in *Sayer's Trusts*, he held that a future gift to the children of a woman sixty years old must be a gift to persons now *in esse*. The

¹ See also §§ 617, 618, *post*. On limiting the exercise of powers to a reasonable period, see § 478, *post*. Cf. also Lennig's Est., 31 W. N. C. (Pa.) 234.

In *Johnson v. Preston*, 226 Ill. 447, a devise to an executor to hold "for the space of twenty-five years from and after the date of the probate" of the will was held void for remoteness. But in 41 Am. Law Rev. 613, 42 Am. Law

Rev. 112, this decision is criticised, and with reason, on the ground that the words cited merely specify the date for the ending and not for the beginning of the term. See *Armstrong v. Barber*, 239 Ill. 389; *Mettler v. Warner*, 243 Ill. 600. Cf. *McCutcheon v. Pullman Bank*, 251 Ill. 550.

² 1 Cox, 324.

³ L. R. 6 Eq. 319.

⁴ 17 Ch. D. 368.

case might have been decided in the way it was on another ground,¹ and there can be little doubt that *Cooper v. Laroche* must be considered one of the not infrequent blunders of that learned judge.² *Jee v. Audley* was followed, and the decision of Malins, V. C., discussed, in *Re Dawson*.³

¹ See Gray, *Restraints on Alienation* (2d ed.), § 272 *f*.

² See 71 *Law Times*, 186; Challis, *Real Prop.* (3d ed.) 191. For other erroneous decisions or *dicta* of Vice-Chancellor Malins on questions of remoteness, see § 207, *ante*; §§ 325, 382, 447, 631, *post*.

There is a class of decisions which must not be confounded with this. Sometimes A. has an absolute interest in personalty, subject to the contingency of there being children of herself or of some other person. In such cases the usual practice in Chancery is not to turn over the custody of the fund to A.; but when, from the age of A. or of the other person, there is no chance that there will ever be such children, the Court of Chancery will order the fund paid to A., on her giving security to turn it over to the children, if born. There is no question of title here, but only of custody and management. *Leng v. Hodges*, Jac. 585. *Fraser v. Fraser*, Id. 586, note. *Hamilton v. Brickwood*, 5 L. J. N. s. Ch. 144. *Brown v. Pringle*, 4 Hare, 124. *Davis v. Bush*, 8 Jur. 1114, note. *Miles v. Knight*, 17 L. J. Ch. 458; 12 Jur. 666. *Mackenzie v. King*, 17 L. J. Ch. 448. *Dodd v. Wake*, 5 De G. & Sm. 226 (which perhaps goes fur-

ther than any other case). *Lyddon v. Ellison*, 19 Beav. 565. *Edwards v. Tuck*, 23 Beav. 268. *Ryan's Settlement*, 9 W. R. 137. *Price v. Boustead*, 8 L. T. R. N. s. 565. *Vidler v. Parrot*, 12 W. R. 976. *Haynes v. Haynes*, 35 L. J. Ch. 303; 14 W. R. 361. *Widdow's Trusts*, L. R. 11 Eq. 408. *Milner's Estate*, L. R. 14 Eq. 245. *Browne v. Taylor*, [1872] W. N. 190. *Summers's Trusts*, 22 W. R. 639. *Belt's Estates*, 25 W. R. 901. *Allason's Trusts*, 36 L. T. R. N. s. 653. *Archer v. Dowsing*, [1879] W. N. 43. *Taylor's Trust*, 43 L. T. N. s. 795; 29 W. R. 350. *Maden v. Taylor*, 45 L. J. Ch. 569. *Davidson v. Kimpton*, 18 Ch. D. 213. *Re Taylor's Settlement Trusts*, [1881] W. N. 12. *Estate of Mellon*, 16 Phila. 323; s. c. *sub nom.* *Gowen's App.*, 106 Pa. 288. *In re Commissioners of Streets*, 7 Ir. Eq. 484. *Farrell v. Cameron*, 29 Grant, 313. See also *Payne v. Long*, cited 19 Ves. 571; *Defflis v. Goldschmidt*, 1 Mer. 417, 422; 19 Ves. 566, 572; *Re Dawson*, 39 Ch. D. 155, 164, 165; 2 Seton, *Decrees* (4th ed.), 976; *Stirling v. Urquhart*, 14 Rettie, C. of Sess. 112. The case of *In re Richards's Trust Estate*, 97 Md. 608, is *contra*. But cf. *Brandon v. Woodthorpe*, 10 Beav. 463; *Re Overhill's*

³ 39 Ch. D. 155. See also *Re Hocking*, [1898] 2 Ch. (C. A.) 567; *Stout v. Stout*, 44 N. J. Eq. 479; *Flora v. Anderson*, 67 Fed. Rep.

182. Observe the passages from Co. Lit. 40, *a*, *b*, cited 39 Ch. D. 163, 164; [1898] 2 Ch. (C. A.) 571.

5. *Lives in Being.*

§ 216. The contingency may be postponed for any number of lives, provided they are all in being when the contingent interest is created; and the persons whose lives are taken need have no interest in the estate. In *Thellusson v. Woodford*¹ the testator directed that the income of his property should be accumulated during the lives of all his sons and grandsons and grandsons' issue who were alive at his death, and that on their death the property with its accumulations should be divided into three lots, each lot to go to the eldest male lineal descendant of one of his sons respectively. It was earnestly urged by counsel that lives could not be taken in this way to prolong the period for the happening of the gift over.² But Lord Chancellor Loughborough, assisted by Lord Alvanley, M. R., and Lawrence and Buller, JJ., sustained the will; and his decree was affirmed in the House of Lords in accordance with the unanimous opinion of the judges.³

§ 217. The difficulties which might arise in case testators were allowed to select any number of lives for the purpose of prolonging the period within which a future estate might vest were strongly pressed by counsel in *Thellusson v. Woodford*. Suppose, for instance, they said, that "all the members of both Houses of Parliament, all the members of both Univer-

Trusts, 22 L. J. Ch. 485; 17 Jur. 342; *Groves v. Groves*, 12 W. R. 45; *Conduitt v. Soane*, 19 W. R. 817; *Croxtan v. May*, 9 Ch. D. 388; *Re Hocking*, [1898] 2 Ch. (C. A.) 567; *Towle v. Delano*, 144 Mass. 95; *Bowlin v. R. I. Hosp. Trust Co.*, 31 R. I. 289; *Flora v. Anderson*, 67 Fed. Rep. 182; Co. Lit. 40 *a*, *b*.

In *Browne v. Warnock*, 7 L. R. Ir. 3, a title, good only on the presumption that a woman of sixty-three would not have a child, was forced on a purchaser, in accordance with Mr. Dart's opinion, 1 Dart, Vend. & P. (7th ed.) 385,

but against that of Lord St. Leonards, Sugd. Vend. & P. (14th ed.) 418; and *accord*. *Whitney v. Groo*, 40 D. C. Ap. 496, and *Re Tinning and Weber*, 8 Ontario L. R. 703. *Contra*, *List v. Rodney*, 83 Pa. 483. See *Miller v. Macomb*, 26 Wend. 229, 234, affirming *Macomb v. Miller*, 9 Paige, 265.

¹ 4 Ves. 227; 11 Ves. 112; 1 B. & P. N. R. 357.

² 4 Ves. 242-244, 277-279, 290-292, 300-303, 314; 11 Ves. 116-119; 2 Harg. Jurid. Arg. 128-142.

³ See § 190, *ante*. For earlier cases to the same effect, see § 189, *ante*.

sities,"¹ "all the persons whose lives are comprised in the several existing tontines,"² were taken; or the executory devise was not to take effect "so long as any person can be found in Europe, or rather in any part of the known world, who was either living or in the womb at the death of the particular testator."³ The only limitation suggested by the opposing counsel or by the Court was that the number of persons taken must be so limited that evidence of their death could be obtained. "When it is asserted that the rule permits the vesting to be postponed during as many lives as can be stated, it must be asserted with this qualification; *provided*, they are not more than will admit of making out, by reasonable evidence, at what time the survivor ceases to exist."⁴ Macdonald, C. B., in giving the opinion of the judges in the House of Lords, cites the language of Twisdén, J., in *Love v. Wyndham*,⁵ and says: "By this expression he must be understood to mean any number of lives the extinction of which could be proved without difficulty."⁶ And again: "But it is asked, shall lands be rendered unalienable during the lives of all the individuals who comprise very large societies or bodies of men, or where other very extensive descriptions are made use of? It may be answered that, when such cases occur, they will, according to their respective circumstances, be put to the usual test, whether they will or will not tend to a perpetuity, by rendering it almost, if not quite, impracticable to ascertain the extinction of the lives described; and will be supported or avoided accordingly."⁷ "The language of all the cases is, that property may be so limited as to make it unalienable during any number of lives, not exceeding that to which testimony can be applied, to determine when the survivor of them drops."⁸

¹ 4 Ves. 244.

² 4 Ves. 277.

³ 4 Ves. 278; 2 Harg. Jurid. Arg. 131.

⁴ 4 Ves. 290.

⁵ 1 Mod. 50, 54; 1 Sid. 450, 451; § 167, *ante*.

⁶ 11 Ves. 134.

⁷ 11 Ves. 136.

⁸ *Per* Lord Eldon, C., 11 Ves. 146. See Harg. Thel. Act, § 18.

§ 218. In *Cadell v. Palmer*¹ the executory devise was to take effect on the death of twenty-eight persons.² The Real Property Commissioners, in their Third Report (1832),³ treated the question fully, and rejected the suggestion of limiting the number of lives, or of requiring the lives to be those of persons taking an interest in the property, but recommended that it should not be lawful to take lives arbitrarily, and that lives should not be made use of to limit a term or period within which to create interests too remote if created out of an estate of inheritance; e. g. an estate to A., for the lives of twenty persons, in trust to pay the income to B. for life, remainder to his unborn son for life, remainder to the son of such son, etc. These suggestions have not, however, been adopted in England.⁴ It is quite possible that the whims of testators may some day compel the courts to lay down a rule limiting the number of lives which can be taken. At present there is no limit.

§ 219. In *Pownall v. Graham*,⁵ a testator gave his estate in trust for his brothers for life, and on the death of the survivor to apply the income for the benefit of such of their children as should appear to the trustees to "stand most in need of the same, and that regularly, from year to year, as the law in such cases admits," and, "after the law, as mentioned aforesaid, admits of no further division among such of my brothers' children," then over. Lord Romilly, M. R., said: "The law would admit this trust for division amongst the children to go on as long as any person living at the moment of the testator's death was in existence, and during twenty-one years after the life of the longest liver of any person then in existence. But it would be impossible to ascertain when that period would cease; and, if it were, all the children of his brother would probably

¹ 1 Cl. & F. 372; 7 Bl. N. S. 202; 10 Bing. 140.

² See *Bender v. Bender*, 225 Pa. 434.

³ Pp. 37-39. *Lewis, Perp. App.* xiv-xvii.

⁴ On the legislative changes which have been made in some of the United States on this point see §§ 742, 747, 751, *post*.

⁵ 33 Beav. 242.

be then dead, and the gift over would fail of taking effect. I am of opinion, therefore, that it is impossible so to construe it, and that the period from which the twenty-one years must begin to be calculated is the death of the last surviving brother. In no other way can effect be given to this trust, for the testator might have directed it to endure as long as any of the children in a charity school should live and twenty-one years after; but unless he so expressed it, it could not be maintained, as it would be impossible for the trustees to ascertain when the trust ceased. The general scope and object of the will itself gives the explanation. No one contends that the trust is to go on until the death of everybody in existence at the testator's death, and both parties have referred to the will as being the guide from which the period from which the twenty-one years is to begin to run is to be ascertained."

§ 219 *a*. *In re Moore*.¹ A testator bequeathed personal property in trust to apply the income in keeping in repair her brother's tomb in Africa, "for the longest period allowed by law, that is to say, until the period of twenty-one years from the death of the last survivor of all persons who shall be living at my death." Joyce, J., held the legacy bad for uncertainty.²

§ 219 *b*. *In Fitchie v. Brown*³ A., by will, directed that the residue of his estate should be "placed in trust for as long a period as is legally possible, the termination or ending of said trust to take place when the law requires it." He appointed a trustee, and directed the payment of annuities to some forty persons named, to them for life, and on their death to their heirs, except three who were to have only life interests. "On the final ending and distribution of the trust, the trust fund to be divided equally among those persons entitled at that time to the aforementioned annuities." By a codicil he

¹ [1901] 1 Ch. 936.

² Mr. Sweet in 1 Jarm. Wills, (6th ed.) 297, 455, says that the gift was not void for uncertainty, but was void within the Rule against Perpetuities; but the gift

in trust was immediate, and the Rule has nothing to do with the end of a trust. See §§ 232 *et seq.*, *post*.

³ 18 Hawaii, 52; 211 U. S. 321.

gave an annuity to a charitable corporation "under the same conditions as the other annuitants." The Supreme Court of the United States, affirming the decree of the Supreme Court of Hawaii, followed *Pownall v. Graham*, and held that the trust continued for twenty-one years after the death of all the persons named as annuitants, and that the gift for distribution at the end of the trust was valid.

6. *Period of Gestation.*

§ 220. Whatever may have formerly been the law, it is now generally agreed that a child *en ventre sa mere* is to be considered as born, when it will be for its benefit to be so considered.¹ Whether, as a general principle, such a child will be considered as born for the benefit of third persons is still *sub judice*.² But whether or not this is true as a general principle, it is true in questions of remoteness. Thus a devise to such of the grandchildren of the testator as reach twenty-one is valid; for although the testator may have a posthumous child, it will be considered as born at the testator's death. Yet here it will be so considered, not for its own sake, but for the sake of the grandchildren.

§ 221. Often two periods of gestation are allowed. Thus, in the case suggested in the previous section, a grandchild may be a posthumous child of a posthumous child. And again, a very common form of testamentary gift is to the testator's children for life, and on their death to their children; but if these latter all die under twenty-one, then to B. and his heirs. Here the gift to B., a stranger, is good.³

§ 221 *a. In re Wilmer's Trusts*,⁴ a testatrix devised land to

¹ Doe d. Clarke v. Clarke, 2 H. Bl. 399. See Marsh v. Reed, 184 Ill. 263; Phillips v. Herron, 55 Ohio St. 478; and Reporter's note to Randolph v. Randolph, 40 N. J. Eq. 73.

² The authorities are collected

5 Gray, Cases on Property, (2d ed.) pages 48-54, note, 718.

³ See Long v. Blackall, 7 T. R. 100; Thellusson v. Woodford, 11 Ves. 112, 143; 2 Harg. Jurid. Arg. 93-126; Lewis, Perp. 147-149.

⁴ [1903] 1 Ch. 874; [1903] 2 Ch. 411.

trustees in trust to pay the income to M. during her life, and on her death to stand possessed of the land in trust for the sons of M. (with certain exceptions) born or to be born, successively for life, with remainder upon the death of each such son upon trust for his first and other sons successively in tail male. M. had a son S. (not within the exceptions) who was begotten, but not born, at the death of the testatrix. It was held by Buckley, J., and by the Court of Appeal that S. took a life estate, and that the remainder to his first and other sons was good, although it would have been for the advantage of S. if he had been considered as unborn at the testatrix's death, for, on that supposition, the remainder to his sons would have been too remote, and he would have taken an estate tail under a subsequent limitation in the will. Therefore, for the purposes of the Rule against Perpetuities, a child *en ventre sa mere* will be considered as born, even when it is actually prejudicial to it to be so considered.

§ 222. In some cases a third period of gestation would be allowed. Suppose, for instance, a devise to testator's children for life, on their death to be accumulated till the youngest grandchild reaches twenty-one, and then to be divided among all the grandchildren then living, and the issue then living of any deceased grandchild. The testator leaves a posthumous child, who dies leaving one child, A., born, and another, B., *en ventre sa mere*. B. is born and reaches twenty-one, but, before he does so, A. dies, leaving his wife *enceinte*, who gives birth to a child after B. reaches twenty-one. Here we have (1) the period until the testator's child is born; (2) the life of such child; (3) the period after the death of such child until B. is born; (4) the minority of B.; (5) the period from the time when B. reaches twenty-one until A.'s child is born. Here we have a life, a minority of twenty-one years, and three periods of gestation. This case was discussed in *Smith v. Farr*,¹ but no decision was given on the point. Mr. Lewis² thought the gift to the issue of the deceased grandchild

¹ 3 Y. & C. 328.

² Perp., Addenda, 726.

good, but afterwards ¹ doubted it, on the ground that, so far as the grandchildren were concerned, the period of gestation of the great-grandchildren was a term in gross, and that, so far as the great-grandchildren were concerned, the period of gestation of the grandchildren was a term in gross. This is true, but it would not seem to invalidate the gift. It was determined in *Cadell v. Palmer* ² that the time of gestation could be allowed only when gestation in fact existed; but if gestation exists, a gift to take effect on the reaching of majority by an infant now *en ventre sa mere* is good, whether such gift be to a third person or not. If Mr. Lewis's doubt was well founded, gifts over to third persons on grandchildren dying under twenty-one, like that given in section 220, would be bad; for so far as the children are concerned the period of gestation of the grandchildren is a term in gross, and so far as the grandchildren are concerned the period of gestation of the children is a term in gross; yet such limitations are exceedingly common, and their validity is undoubted. It is submitted that the true doctrine is that in applying the Rule against Perpetuities a child *en ventre sa mere* will be considered as born.

7. Term of Twenty-one Years.

§ 223. The term of twenty-one years may be taken in gross without reference to any infancy. This was settled in England by the case of *Cadell v. Palmer*,³ and seems to have never been questioned in America. The curious and illogical manner in which the Rule against Perpetuities was extended beyond lives in being has been stated in the preceding chapter.⁴

§ 224. As early as 1813 twenty-one years after lives in being was recognized in the United States by Judge Story as the limit of the Rule against Perpetuities,⁵ and, as has been

¹ Suppl. 22-26.

⁴ See §§ 171-188.

² 1 Cl. & F. 372; 7 Bl. N. S. 202; 10 Bing. 140.

⁵ *Barnitz v. Casey*, 7 Cranch 456, 469. See *Pleasants v. Pleasants*,

³ 1 Cl. & F. 372; 7 Bl. N. S. 202; 10 Bing. 140.

2 Call, 319, 331.

said, the doctrine has met with acceptance everywhere. In *Mayor of New York v. Stuyvesant*,¹ however, it appears to have been overlooked. There A., in 1825, conveyed a parcel of land to B. and C. for their own use, but in trust to permit A., his heirs and assigns, until the parcel was opened as a public square, to enjoy the rents, and after B. and C., their heirs and assigns, should have elected to lay open, and should actually lay open, the same as a public square, then in trust that the same be forever kept open and used as a public square; *provided*, that if the parcel should not within thirty years be so opened, then the land should revert to A., his heirs and assigns, for their own use. The parcel was actually laid open in 1850. It was held that A. had lost all claim to the land. It would seem that the dedication to the public was a shifting trust which was bad for remoteness, as it might not take effect for thirty years; but the point is not suggested in the opinion.

8. *Limitations of an Estate for Life or of a Term not exceeding Twenty-one Years.*

§ 225. No limitation of a present life estate, or of a present term of not more than twenty-one years, can be bad for remoteness. Thus if an estate for the life of A. (or a term for twenty years) is devised to such of the children of L. as reach twenty five, but if none of them reach twenty-five then over to M. and his heirs, the devise to M. is good, because it must take effect, if at all, within the lifetime of A. (or within twenty years). This is so obvious that it is strange it should ever have been doubted. Yet it has been questioned, and there seems to be little authority directly deciding it.²

§ 226. In *Love v. Wyndham*³ (1670) a term for ninety-nine years, if three lives so long lasted, was given by the testator to Dulcibella his wife, on her death to his son Nicholas for life, and if Nicholas should die without issue, then to his

¹ 17 N. Y. 34.

² See Marsden, Perp. 24, 25, 193.

³ 1 Mod. 50; 1 Sid. 450; 2 Keb. 637; 2 Ch. Rep. 14; 1 Vent. 79; 1 Lev. 290; § 167, *ante*.

son Barnaby. It was held that the devise to Barnaby was void. No attention was paid on the bench or at the bar to the fact that the term was to last only during the lives of living persons; the term was treated like a simple term for ninety-nine years; and the gift to Barnaby was held bad because of the character of the contingency, not of its remoteness. The Rule against Perpetuities had not yet formulated itself.¹

§ 227. In *King v. Cotton*² the point was raised but not decided. The learned reporter says: "It seems rather to be a good limitation." In *Low v. Burron*³ an estate for three lives was devised to M. for life, remainder to her issue male, remainder to L. Lord Chancellor Talbot thought that the gift to L. was good, and that M. could not bar it.⁴ He said: "Here can be no danger of a perpetuity; for all these estates will determine on the expiration of the three lives. So if, instead of three, there had been twenty lives, all spending at the same time, all the candles lighted up at once, it would have been good; for, in effect, it is only for one life, viz. that which shall happen to be the survivor." This case seems authority for the proposition that limitations of an estate *pur auter vie* cannot be too remote.⁵

¹ See Lewis, Perp. 675.

² 2 P. Wms. 674, 676.

³ 3 P. Wms. 262.

⁴ The last point has since been determined otherwise. See notes to *Low v. Burron*; Fearn, C. R. 496 *et seq.*; Tud. L. C. in Real Prop. (4th ed.) 101; Challis, Real Prop. (3d ed.) 362.

⁵ See *Saltern v. Saltern*, 2 Atk. 376; *Campbell v. Harding*, 2 Russ. & M. 390, 406; *Harris v. Davis*, 1 Coll. 416, 423; *Mills v. Smith*, 193 Mass. 11, 17; Fearn, C. R. 496 *et seq.*; *Id.* 500, Butler's note; Lewis, Perp. 673-681; Prior on Lim. § 161; 8 Jur., pt. 2, 261.

In *Wastneys v. Chappell*, 3 B. P. C. (Toml. ed.) 50, a conveyance

by a *quasi* tenant in tail of an estate *pur auter vie* was held not to bar the remainder over. But the tenant in tail was himself a remainder-man, not in possession at the time of his conveyance, and a conveyance by such *quasi* tenant in tail in remainder does not bar subsequent remainders, without the concurrence of the holder of the particular estate (see *Edwards v. Champion*, 3 De G. M. & G. 202). Therefore the decision was consistent with the power of a *quasi* tenant in tail in possession to bar remainders, and a future interest which can be barred is never too remote. But this does not apply to *Low v. Burron*, for the re-

§ 228. In the United States the question presented itself in bequests of slaves. If a female slave was bequeathed to A., but if he died without issue then to B., the gift was too remote; for the gift of a female slave included the gift of her issue.¹ In *Matthews v. Daniel*² a negro man and a horse were bequeathed to A. and her heirs, but if she died without issue then over. The gift over was held too remote. The case is very briefly reported. The Court say: "The argument that here the event must happen, if at all, in the lifetime of the negro, and that so the event is limited to a life in being, has at least the merit of novelty to recommend it, but will not bring the case within the legal limits." But it was easier to sneer at the argument than to refute it. It seems unanswerable. In *Biscoe v. Biscoe*³ there was a gift of a male slave to J., but if J. died without issue then over. It was held that the gift over was not too remote, and that this result was produced by the fact of the slave being male. But the case was not decided on the ground that no limitation of a male slave could be too remote, but because the subject matter of the gift showed that the testator intended a definite failure of issue; and consequently, in *Hatton v. Weems*,⁴ a like gift over of both negro men and women was held void, on the ground that the same rule of construction must apply to both; that an indefinite failure of issue was meant; and that gifts of male and female slaves after an indefinite failure of issue were all bad. *Sed qu.*⁵

mainder there was held not bar-
rable by the tenant in possession.
That case, therefore, is author-
ity for the proposition that no
limitation of a life estate can be
too remote.

If in an estate *pur auter vie* one
or more of the *cestuis que vie* are
not *in esse*, a limitation of such an
estate might be too remote; but
Mr. Charles Sweet, 49 Sol. J. 793,
has shown reason to doubt whether,

apart from the Rule against Per-
petuities, *cestui que vie* can be a
person not *in esse*.

¹ *Johnson v. Lish*, 4 H. & J.
411.

² 2 Hayw. 346.

³ 6 Gill & J. 232.

⁴ 12 Gill & J. 83.

⁵ See *Johnson v. Lish*, 4 H. & J.
441; *Edelen v. Middleton*, 9 Gill,
161; *Royal v. Eppes*, 2 Munf. 479;
M'Donald v. M'Mullen, 2 Mills,

§ 228 *a*. Must the lives in being be human lives? Suppose a limitation, in itself too remote, be made of a horse, or dog, or parrot, or of some animal of great longevity, real or supposed, such as an elephant, or crow, or tortoise, or carp, or of a female animal, such as a cow or hen, would it be void? ¹

§ 229. *Low v. Burron* ² seems to be the only direct adjudication that a limitation of a life estate cannot be too remote. But to hold such a limitation too remote would be so palpable a violation of the fundamental principle of the Rule against Perpetuities, that there can be little doubt that *Low v. Burron* is correct on this point.

8 *a*. Covenants to renew Leases.

§ 230. That a lease for lives or for years may be, as matter of fact, renewed by the lessor does not make it bad, for the lessees have no right to a renewal.³ Suppose, however, that the lease contains a covenant by the lessor for perpetual renewal? It is no objection to a lease that it contains such a covenant, if the entire control of the covenant is in the hands of those persons who have vested interests under the lease.⁴ Sir George Jessel, M. R., in *London & S. W. R. Co.*

Const. 91; *Hope v. Johnson*, 2 Yerg. 123.

It was the law in Virginia that the Rule against Perpetuities did not apply to provisions for emancipation. *Pleasants v. Pleasants*, 2 Call, 319. *Wood v. Humphreys*, 12 Grat. 333. See *Peggy v. Legg*, 6 Munf. 229; *Crawford v. Moses*, 10 Leigh, 277, 284. But in Kentucky it has been held to apply to them. *Ludwig v. Combs*, 1 Met. (Ky.) 128. Compare *Williams v. Ash*, 1 How. 1, 13; *Harris v. Clarissa*, 6 Yerg. 227, 241; *Smith v. Dunwoody*, 19 Ga. 237, 260.

¹ See *Re Dean*, 41 Ch. D. 552, and App. H, §§ 905, 906, *post*; and cf. 18 Jurid. Rev. 36.

² 3 P. Wms. 262.

³ 8 Jur., pt. 2, 273.

⁴ *Ross v. Worsop*, 1 B. P. C. (Toml. ed.) 281. *Sweet v. Anderson*, 2 B. P. C. 256. *Hare v. Burges*, 4 K. & J. 45, 57. *Meller v. Stanley*, 2 De G. J. & S. 183, 192. *Pollock v. Booth*, Ir. R. 9 Eq. 229, 607. *Marsden, Perp.* 15. See *Banks v. Haskie*, 45 Md. 207, 218. Cf. *Blackmore v. Boardman*, 28 Mo. 420; *Diffenderfer v. St. Louis Public Schools*, 120 Mo. 447, in which cases the Supreme Court of Mis-

v. *Gomm*,¹ speaks of this as an exception to the Rule against Perpetuities;² but it seems hardly necessary to create any exception to meet the case, — the covenant to renew is part of the lessee's present interest.³ The right which the present possessor of land has to continue or to drop his possession is not a right subject to a condition precedent. The Rule against Perpetuities, as has been remarked before, although a strict rule, is yet a practical rule. An estate for years with a perpetual covenant for renewal is, so far as questions of remoteness are concerned, substantially a fee, and as such it is regarded.⁴ If the right of renewal, however, is not within the control of those having vested interests under the lease, and if the interest of the person within whose absolute control the right will be may not vest within the period required by the Rule against Perpetuities, the limitation to such person is bad.⁵ Thus, if an estate for lives or years with a covenant for perpetual renewal is devised to A. for life, and on his death to his (unborn) children and their heirs, but if all his children die under twenty-five then to C. and his heirs, the devise to C. is bad.⁶

§ 230 *a*. The author's learned friend, Mr. T. Cyprian Williams, in an article in the *Solicitor's Journal*,⁷ comments on the preceding section; and in reference to the language in the

souri, while declaring that the law does not favor a perpetual covenant for the renewal of a lease, recognizes that if the intention of the parties to create such a perpetual covenant, is unmistakable, the law will enforce it.

¹ 20 Ch. D. 562, 579.

² And see *Challis*, Real Prop. (3d ed.) 186.

³ See *Moore v. Clench*, 1 Ch. D. 447, 452; *Buckland v. Papillon*, L. R. 1 Eq. 477; L. R. 2 Ch. 67; *Muller v. Trafford*, [1901] 1 Ch. 54, 61.

⁴ See 2 *Tiffany*, Landl. & Ten.

§ 221. Such a covenant, however, was held void as creating a perpetuity in *Morrison v. Rossignol*, 5 Cal. 64; and see *Syms v. Mayor*, 18 Jones & Sp. 289. Cf. *Hudgins v. Bowes*, 110 S. W. Rep. (Tex. Civ. Ap.), 178.

⁵ See *Hope v. Gloucester*, 7 De G. M. & G. 647; *A. G. v. Greenhill*, 9 Jurist, n. s. 1307; *Brush v. Beecher*, 110 Mich. 597; *Hudgins v. Bowes*, 110 S. W. Rep. (Tex. Civ. Ap.), 178; *Redington v. Browne*, 32 L. R. Ir. 347, 357, 358.

⁶ 8 Jur., pt. 2, 273.

⁷ 42 Sol. J. 628, 630, 650.

text: "The covenant to renew is part of the lessee's present interest. The right which the present possessor of land has to continue or drop his possession is not a right subject to a condition precedent," he says: "This explanation appears sufficient in the case of an absolute covenant to renew a lease for years, but is not equally satisfactory where the right of renewal is limited to arise only on giving notice within a particular time and paying a specified fine;" and that it does "some violence to the language" of such a covenant to hold that "in such a case the equitable interest created is not an interest to arise in future on fulfilment of a condition precedent, but a present interest defeasible on the condition subsequent of not giving due notice to renew, or paying the fine." The criticism has weight. The construction suggested does do "some violence to the language." The choice seems to lie between adopting such construction, or recognizing that covenants to renew in the form suggested by Mr. Williams, are either void, or else are exceptions to the application of the Rule against Perpetuities.

§ 230 *aa*. That covenants for the renewal of leases are not open to the objection of remoteness, and that this is an exception to the Rule against Perpetuities, seems now to be recognized as law. In *Woodall v. Clifton*¹ the opinion of Warrington, J., is valuable for a full discussion of these covenants. He concludes² that he "must treat these covenants to renew as exceptions to the general rule [against perpetuities] — exceptions for which it is very difficult to find a logical justification, but exceptions which have been probably recognized because they were in existence long before the rule had been developed." And in the same case Romer, L. J., in the Court of Appeals,³ said: "I have always understood that the exception of covenants to renew a lease from the Rule against Perpetuities could not be justified on principle, but only by a long series of decisions." And in *In re Tyrrell's Estate*⁴ Ross, J., said: "Contracts for

¹ [1905] 2 Ch. 257.

³ P. 268.

² P. 265.

⁴ [1907] 1 I. R. 194, 197.

the renewal of leases are an exception to the rule. Why they are an exception nobody can tell," and so *In re Garde Browne*.¹

§ 230 *b*. An option to a tenant for years to purchase the fee, exercisable at a remote time, is bad as violating the Rule against Perpetuities.² The matter is fully discussed by Mr. Williams in the article cited in § 230 *a*. The only reason for considering the Rule against Perpetuities as inapplicable to such an option is the analogy to covenants for renewal treated in the three preceding sections. But the exemption from the Rule in the case of covenants for renewal is either an exception which there is no reason to extend, or is to be explained, as it is in § 230, on the ground that the covenant to renew is part of the present interest, a ground which cannot well be taken when the present interest is a tenancy for years, and the interest to be purchased is a fee.³

9. *Time runs only from Testator's Death.*

§ 231. As the law should not take a wanton pleasure in thwarting the intention of a testator, it seems strange that it could ever have been supposed that the question of remoteness was to be determined by the state of things at the date of a testator's will, and not at the time of his death. The object of the Rule against Perpetuities is to confine the vesting of contingent estates to a short period after their creation; and if it is certain when the estate is created that the contingent event must happen within the required time, it seems a needless interference with the testamentary power to say that the estate is bad, because, at some time, before the estate was

¹ [1911] 1 I. R. 205. See Challis, *Real Prop.* (3d ed.) 186; 11 *Enc. Laws of Eng.* (2d ed.) 70.

² *Woodall v. Clifton*, [1905] 2 Ch. (C. A.) 257, and see *London & S. W. R. Co. v. Gomm*, 20 Ch. D. 562; § 275, *post*; 49 Sol. J. 64, 543, 547, 592, 740; *Marsden, Perp.* 14; 1 *Dart, Vend. & P.* (7th ed.)

275; 1 *Wms. Vend. & P.* (2d ed.) 370; 2 *Tiffany, Landl. & Ten.* § 256; *In re Tyrrell's Estate*, [1907] 1 I. R. 292, overruling s. c. [1907] 1 I. R. 194. On the local law in Maryland, see *Hollander v. Central Metal Co.*, 109 Md. 131.

³ See Mr. Williams's article, *ubi supra*.

created and when its existence was entirely in the control of the testator, it was not certain that the contingent event would happen within the required time. For example, land is devised to those children of A. who reach twenty-five. If the testator die before A. the gift is too remote, because A. may have a child born after the testator; but if A. die before the testator, there can be no objection to the devise, because it must take effect, if at all, in the lives of A.'s children, and none of these can be born after the testator's death. Mr. Lewis in the Supplement to his treatise proves superabundantly that the time of the testator's death is the true period at which to judge of the remoteness of the provisions in his will.¹ The rule that the question of remoteness is to be determined from the time of the testator's death, and not of his will, is now settled.²

¹ P. 27 *et seq.* But see *A. G. v. Gill*, 2 P. Wms. 369, 370; *Gower v. Grosvenor*, 5 Mad. 337, 341.

² *Vanderplank v. King*, 3 Hare, 1, 17. *Faulkner v. Daniel*, Id. 199, 216. *Williams v. Teale*, 6 Hare, 239, 251. *Cattlin v. Brown*, 11 Hare, 372, 382. *Dungannon v. Smith*, 12 Cl. & F. 546 *et passim* (see Lewis, Perp. Suppl. 53-57). *Peard v. Kekewich*, 15 Beav. 166. *Southern v. Wollaston*, 16 Beav. 166, 276. *Monypenny v. Dering*, 2 De G. M. & G. 145, 170. *Hale v. Hale*, 3 Ch. D. 643, 645. *Hosea v. Jacobs*, 98 Mass. 65, 67. 1 Jarm. Wills (6th ed.) 300. Tud. L. C. in Real Prop. (4th ed.) 595. 4 Kent, Com. (12th ed.) 283, note 1. See Rye's Settlement, 10 Hare, 106, 112; *Murphey v. Brown*, 159 Ind. 106; *Penfield v. Tower*, 1 N. Dak. 216, 218, 219.

So in New York, under the Revised Statutes. *Lang v. Ropke*, 5 Sandf. S. C. 363, 369, 370. *Lang v. Wilbraham*, 2 Duer, 171, 175.

Griffen v. Ford, 1 Bosw. 123, 137. In *Odell v. Youngs*, 64 How. Pr. 56, Beach, J., in the Court of Common Pleas, said that *Schettler v. Smith*, 41 N. Y. 328, *Van Nostrand v. Moore*, 52 N. Y. 12, and *Colton v. Fox*, 67 N. Y. 348, seemed to overrule *Lang v. Ropke* and *Griffen v. Ford*, and he held that the question of the remoteness of a devise must be determined as from the date of the will and not at the testator's death; but the three cases cited by him as overruling *Lang v. Ropke* and *Griffen v. Ford* have nothing whatever to do with the matter, and the decision in *Odell v. Youngs* is certainly wrong.

So also in Ohio, under St. of 1811, 2 Rev. Sts. (1880) § 4200, *McArthur v. Scott*, 113 U. S. 340, 382; and in Michigan, under 2 How. Sts. § 5531, 3 Mich. Compiled Laws, § 8797, *Mullreed v. Clark*, 110 Mich. 229.

Suppose personal property is

10. *Enough if Interest begins within the Required Limits.*

§ 232. An interest is not obnoxious to the Rule against Perpetuities if it begins within lives in being and twenty-one years, although it may end beyond them.¹ If it were otherwise, all fee-simple estates would be bad. The law is the same with lesser estates. That an estate can be limited to an unborn person for life, whether there be a gift over or not, was repeatedly held or assumed down to 1820.² The only thing to the

bequeathed to A. and the heirs of his body, and if A. dies without issue, then to B., and there is a lapse by reason of A.'s death without issue before the testator, does B. take? There has been a difference of opinion on this point. Sir Richard Pepper Arden, M. R., in *Brown v. Higgs* (1799), 4 Ves. 708, 717, thought that B. would take; so did Sir William Grant, M. R., in *Donn v. Penny* (1815), 1 Mer. 20, 22, 23; and so also did Lord Langdale, M. R., in *Mackinnon v. Peach* (1838), 2 Keen, 555, 560. On the other hand, Vice-Chancellor Knight Bruce thought that B. would not take. *Harris v. Davis* (1844), 1 Coll. 416, 424-426; and see *A. G. v. Gill*, 2 P. Wms. 369. Cf. also *Andrew v. Andrew*, 1 Coll. 686, 690 *et seq.*; *Hughes v. Ellis*, 20 Beav. 193; *Greated v. Greated*, 26 Beav. 621; *Stringer's Estate*, 6 Ch. D. 1, 7, 15. The Court of Appeal has now held, in accordance with common sense, that B. will take. *Re Lowman*, [1895] 2 Ch. (C. A.) 348; and see *Murphey v. Brown*, 159 Ind. 106. Cf. cases cited in *Gray, Restraints on Alienation* (2d ed.), § 64, note.

In *Bullard v. Shirley*, 153 Mass. 559, a testator gave \$5,000 to A., and, on his death, for an illegal

charitable purpose, "failing which it shall revert to my heirs." It was held that the gift to the heirs was not too remote.

¹ See *Pulitzer v. Livingston*, 89 Me. 359, 365; *Brooks v. Belfast*, 90 Me. 318, 323; *Gray v. Whittemore*, 192 Mass. 367, 372; *Lennig's Est.*, 31 W. N. C. (Pa.) 234; *Owens's Pet.*, 34 W. N. C. (Pa.) 354; 3 Pa. Dist. Rep. 328; *Johnston's Est.*, 185 Pa. 179, 184, 185; *Lyons v. Bradley*, 168 Ala. 505, 512; *Madison v. Larmon*, 170 Ill. 65, 73, 74; *Flanner v. Fellows*, 206 Ill. 136; *Mettler v. Warner*, 243 Ill. 600, 609; *Holmes v. Walter*, 118 Wis. 409; 1 *Tiffany, Real Prop.*, §§ 152, 155; App. M., §§ 970 *et seq.*, *post.*

² *Cotton v. Heath*, 1 Roll. Ab. 612, pl. 3; Pollexf. 26 (1638). *Marlborough v. Godolphin*, 1 Eden, 404, 415 (1759). *Evans v. Astley*, 1 W. Bl. 521, 523 (1764). *Den v. Page*, 3 T. R. 87, note (1783). *Hay v. Coventry*, *Id.* 83, 86 (1789). *Routledge v. Dorril*, 2 Ves. Jr. 357, 366, 367 (1794). *Brudenell v. Elwes*, 1 East, 442, 452, 453 (1801). *Foster v. Romney*, 11 East, 594 (1809). *Beard v. Westcott*, 5 Taunt. 393; 5 B. & Ald. 801 (1813). See *Doe d. Liversage v. Vaughan*, 5 B. & Ald. 464; 1 Dowl. & Ry. 52 (1822).

contrary was a *dictum* of Buller, J., in *Robinson v. Hardcastle*¹ (1788). Sir John Leach, however, in *Deerhurst v. St. Albans*² (1820), when Vice-Chancellor, said that an estate for life to an unborn child was bad; and in *Hayes v. Hayes*³ (1828), when Master of the Rolls, he expressly decided that such an estate was bad, unless followed by a vested interest. This was undoubtedly, however, a slip of that learned judge. He is said to have himself repented of it;⁴ and it has been repeatedly overruled in England, sometimes *sub silentio*,⁵ sometimes with pointed condemnation.⁶ And so are the text-books.⁷ The American authorities are the same.⁸ As an estate for life is good if it begins within the required limits, even if it is to terminate upon a contingency,⁹

¹ 2 T. R. 241, 253.

² 5 Mad. 232, 278.

³ 4 Russ. 311.

⁴ Boughton v. James, 1 Coll. 26, 37.

⁵ As in *Bennett v. Lowe*, 7 Bing. 535; 5 Moore & P. 485; *Ashley v. Ashley*, 6 Sim. 358; *Burley v. Evelyn*, 16 Sim. 290; *Cattlin v. Brown*, 11 Hare, 372, 375; *Boughton v. James*, 1 Coll. 26, 36; *Gooch v. Gooch*, 14 Beav. 565; 3 De G. M. & G. 366, 383; *Avern v. Lloyd*, L. R. 5 Eq. 383; *Stuart v. Cockerell*, L. R. 7 Eq. 363; L. R. 5 Ch. 713; *Evans v. Walker*, 3 Ch. D. 211; *Re Roberts*, 19 Ch. D. 520. So *Hutchinson v. Tottenham*, [1898] 1 I. R. 403; *Re Crichton Estate*, 23 Manitoba, 597.

⁶ *Williams v. Teele*, 6 Hare, 239, 250, and especially *Hampton v. Holman*, 5 Ch. D. 183, 188, *per Jessel*, M. R.

⁷ 1 Jarm. Wills (6th ed.) 348. Sugd. Pow. (8th ed.) 392, 393. Lewis, Perp. Suppl. 144. Leake, Land Law, 334. Gilb. Uses (Sugd. ed.) 268. Marsden, Perp. 174, 175.

⁸ *Otis v. McLellan*, 13 Allen,

339. *Loring v. Blake*, 98 Mass. 253. *Lovering v. Worthington*, 106 Mass. 86. *Simonds v. Simonds*, 112 Mass. 157, 163, 164. *Minot v. Taylor*, 129 Mass. 160. *Seaver v. Fitzgerald*, 141 Mass. 401. *Dodge v. Bennett*, 215 Mass. 545. *Loomer v. Loomer*, 76 Conn. 522, 527. *Stout v. Stout*, 44 N. J. Eq. 479. *Ogden v. McLane*, 73 N. J. Eq. 159. *Lawrence's Estate*, 136 Pa. 354. *Ronckendorff's Estate*, 11 Pa. C. C. 447. *Heald v. Heald*, 56 Md. 300. See *Wood v. Griffin*, 46 N. H. 230; *Goldsborough v. Martin*, 41 Md. 488. But cf. *Bradford v. Griffin*, 40 So. Car. 468, 471, stated § 398 *a, post*; *Brown v. Columbia Finance Co.*, 123 Ky. 775.

If property is shared among a class for their lives, and some of the class may not come into existence within the required limits, of course the whole gift is bad. *Barnum v. Barnum*, 26 Md. 119. *Deford v. Deford*, 36 Md. 168. *Goldsborough v. Martin*, 41 Md. 488. See Chap. X., *post*.

⁹ *Wainwright v. Miller*, [1897] 2 Ch. 255. *Re Gage*, [1898] 1 Ch. 498.

so a term for years beginning within those limits is good likewise. Thus a devise of a term for twenty-five years to begin on the death of a person living at the testator's decease is good, although followed by a limitation bad for remoteness.¹ So easements and other rights in the land of other persons may be made terminable at remote periods.²

§ 232 *a*. If an estate is given to A. for life, remainder to his children as joint tenants for life, the remainder is valid.³

§ 233. One qualification must be made of the statement in § 232. When there is a good absolute gift, and the settlor or testator goes on in a second clause to modify the gift by directing that the donee shall have a particular estate, with a limitation over to his children, issue, etc., and this latter limitation is bad for remoteness, the whole modifying clause is disregarded, and the donee takes the absolute interest.⁴

§ 234. Although the doctrine that an estate is not too remote if it begins within the limits prescribed by the Rule against Perpetuities is recognized on both sides of the Atlantic, and although an opposite view would conflict with the fundamental principles which govern questions of remoteness, yet there are some American cases which are not conformable to this doctrine, and which therefore should be examined. In some of them, absolute interests have been said to violate

See *Boughton v. James*, 1 Coll. 26, 46.

¹ *Gooding v. Read*, 21 Beav. 478; 4 De G. M. & G. 510. *Re Watson*, [1892] W. N. 192. *Re Wise*, [1896] 1 Ch. 281. Cf. *Rhodes's Estate*, 147 Pa. 227. But see *Johnston's Estate*, 185 Pa. 179, § 249 *b*, *post*; *O'Brien's Estate*, 24 Vict. L. R. 360. In *In re Blew*, [1906] 1 Ch. 624, Warrington, J., said that when the trustees of a term exceeding twenty-one years had a discretion to apply the income, the

trust of the term was void, and on that ground he disapproved *Re Watson* and *Re Wise*, *supra*. See 1 Jarm. Wills (6th ed.) 301, 308. On such discretionary trusts, see § 246, *post*.

² See § 17, *ante*; § 279, *post*.

³ *In re Roberts*, 19 Ch. D. 520. *In re Price*, 8 Tasmanian, 95. *Marsden, Perp.* 178. See *In re Stevens*, [1912] Vict. L. R. 194; § 207, *ante*.

⁴ These cases are considered in Chap. XIII., *post*.

the Rule against Perpetuities, although beginning within lives in being; in others, life interests beginning in like manner have been said to be too remote. They will be taken up in succession.

§ 234 *a*. These decisions and *dicta* are generally sporadic, and are inconsistent with or are overruled by cases in the same jurisdictions in which they have occurred. In Maryland alone, a considerable series of cases seems to have established, for the time at least, a doctrine contrary to the Common Law.¹ There will here be taken up in succession: (I.) Cases generally in which absolute interests beginning within, or at the end of, lives in being have been said or held to violate the Rule against Perpetuities. (II.) Cases generally in which life interests beginning within, or at the end of, lives in being have been said or held to violate the Rule. (III.) The series of Maryland cases.

§ 235. (I.) *Cases where an absolute interest beginning within, or at the end of, lives in being has been said or held to violate the Rule against Perpetuities. Slade v. Patten.*² In this case there was an immediate devise to trustees in trust for children and their heirs, and the devise was held to violate the Rule against Perpetuities. The Court said: "If the trustees are to hold the estate for the four daughters and the heirs of the daughters, then the trust is void as creating a perpetuity." The decision was that the daughters took a legal fee; undoubtedly it should have been that they took an equitable fee. But as they could have immediately demanded a conveyance from the trustees, the practical difference was small. But the Court said that the trust could not be considered as for the daughters for life, remainder for their heirs in fee, and that even if this were the construction, it would "create a perpetuity, because it was possible that they might have heirs unborn at the testator's death, and in whom the estate would not vest within lives in being and twenty-one years and a fraction afterwards." But the daughters' heirs must take the

¹ But see § 245 *l. post*.

² 68 Me. 380.

fee on the daughters' death, and the daughters must be alive (or begotten) at the testator's death.¹

§ 236. In this opinion very different things were confounded. There are two distinct rules of law, by the joint action of which the tying up of estates is prevented. 1. Estates cannot be made inalienable. 2. Future estates cannot be created beyond the limits fixed by the Rule against Perpetuities. If land is devised to A. in trust for B. and his heirs, the Rule against Perpetuities has no application. The trust is perfectly good.² B.'s equitable fee is no more objectionable because it may last forever than is a devise of a legal fee simple; that, too, may last forever. B. may at once demand from the trustee a conveyance of the legal fee.³ An equitable fee cannot be made inalienable.⁴

§ 237. But *Slade v. Patten*, though cited as authority in *Hamlin v. Mansfield*,⁵ was in *Pulitzer v. Livingston*,⁶ after full and elaborate discussion, overruled.⁷

§ 237 *a*. In *Pennsylvania Co. v. Price*⁸ property was conveyed to a trustee in trust for eight children, their heirs and assigns, with an option in the trustee, his heirs and assigns, to convey the principal to the *cestuis que trust*. It was held by the Court of Common Pleas of Philadelphia that the *cestuis que trust* had the right to a conveyance; that is, the Court held the attempt to restrain the alienation of the estate, by giving the trustee, his heirs and assigns, an option to withhold it, to be void. This was certainly correct. The language of the Court is unfortunate, however, as lending countenance to the idea that an equitable fee is obnoxious to the Rule against Perpetuities.

¹ The case was criticised in 14 Am. Law Rev. 237.

² See *Harlow v. Cowdrey*, 109 Mass. 183; *O'Rourke v. Beard*, 151 Mass. 9, 11; *Cooper's Estate*, 150 Pa. 576, 585; *Hart v. Seymour*, 147 Ill. 598, 613, 614.

³ On a local doctrine in Massachusetts and Illinois, and its connection with the Rule against

Perpetuities, see §§ 121 *c*, *et seq.*, *ante*.

⁴ See § 119, *ante*; Gray, *Restraints on Alienation* (2d ed.), §§ 105 *et seq.*

⁵ 88 Me. 131, 138.

⁶ 89 Me. 359.

⁷ See, however, *Towle v. Doe*, 97 Me. 427; § 245 *a*, *post*.

⁸ 7 Phila. 465.

§ 237 *b.* In *Williams v. Herrick*¹ a testator gave all his estate to trustees in trust to erect a "brick block" on his land to be forever known as the "A. G. & A. W. Olney Block," and to pay the rents and income among such of his heirs as should present satisfactory proof of their claims to the trustees; vacancies among the trustees to be filled by the Court of Probate "ever thereafter." The heirs and next of kin of the testator brought a bill in equity to have the testator's estate conveyed to them, and the Court overruled a demurrer to the bill, rightly it would seem. But, as in *Pennsylvania Co. v. Price*, the Court uses language about "perpetuities," which had better have been avoided.

§ 237 *c.* In *Bigelow v. Cady*² a testator directed that his land should be taken charge of by his executrix; that the income should be equally divided between his wife and his three children; that "in case of death of either of the four above-named heirs it shall go (their share) to the heirs of the deceased heir, if they have any; if not, it shall be equally divided between my remaining heirs above mentioned and their heirs forever, share and share alike;" that if his wife "dies leaving no heir of mine, then her share (one-fourth) shall go to my heirs and their heirs forever, share and share alike;" and that in case of the death or inability of the executrix, the judge of the Probate Court "shall from time to time and for all time to come, appoint" a successor. The testator's wife and children brought a bill for partition. As the Rule in *Shelley's Case* is in force in Illinois, it would seem that no one was interested in the land except the plaintiffs, and that therefore the Court was right in overruling a demurrer to the bill. The inaccurate language of the Court as to the Rule against Perpetuities is to be regretted.³

§ 237 *d.* The reason why a trust which is not charitable and

¹ 19 R. I. 197.

² 171 Ill. 229.

³ This language is the more matter of surprise, because of the recent

case of *Hart v. Seymour*, 147 Ill. 598, 613, 614. See *Davis v. Williams*, 85 Tenn. 646; *Johnson v. Preston*, 226 Ill. 447.

which has no definite *cestuis que trust*, — for instance a trust to keep a grave in repair — is invalid, is because there is no person who has a right to enforce it and not because it violates the Rule against Perpetuities, for it does not violate the Rule, although it has been sometimes said that it does.¹

§ 238. (II.) *Cases where a life interest beginning within, or at the end of, lives in being has been held to violate the Rule against Perpetuities.* In *Smith v. Dunwoody*² the question was whether a very illiterate and confused will should be admitted to probate. The Court, why is not very apparent, considered the legality of the provisions of the will. There was a gift of the income of the testator's estate to certain persons named and their heirs. It was held that this was a gift of the *corpus*. The executors were charged to pay annually to each of the testator's slaves \$5, and \$100 to some Baptist minister, and to keep the chapel on the estate in repair; and the testator also directed that every tenth slave born after his death should be emancipated. All these provisions were held bad, on the ground, it is said, that they were too remote. So far as the gift of \$5 a year was to slaves unborn at the testator's death it was, in part, at least, bad, but so far as it was to slaves then living it seems good. The gift was not to a class, but to each slave separately; and the gift to one was not affected by the validity or invalidity of the gift to any other.³ Very likely, however, no such bequest to a slave would have any legal validity.⁴

§ 239. In *Smith's Appeal*⁵ property was devised to trustees in trust to pay the income to B. for life, and on her death as B. might by will appoint. B. appointed to trustees in trust for her children for life without liability for their debts, and directed that on the death of each child its share should go over. All B.'s children were born before the testator's death.

¹ E. g. *Hartson v. Elden*, 50 N. J. Eq. 522. See App. H, §§ 898 *et seq.*, *post*.

² 19 Ga. 237.

³ See § 389, *post*.

⁴ The direction to emancipate

was finally held void on the ground that it was repugnant to the gift of the property. See § 228, note, *ante*.

⁵ 88 Pa. St. 492.

The Court held the appointment bad, because B. might have had children born after the testator's death. B. might certainly have had such children, but all B.'s children, whether born before or after the death of the testator, would have taken at B.'s death, and therefore the life estates to the children were good.¹ *Smith's Appeal*, on this point, has been overruled by *Lawrence's Estate*.²

§ 240. In *Gardette's Estate*³ P. devised property to C. for life, and on her death to her children and issue in such shares and for such estates as she should by will appoint. C. appointed to trustees in trust for her daughter J. for life, without power of anticipation. J. was not born until after P.'s death. The Orphans' Court of Philadelphia held that the appointment was void. But as J.'s life estate began on the death of C., the appointment would seem to have been clearly good. The restraint on anticipation was either good, or if it was too remote, it should have been disregarded.⁴

§ 241. In *Thomson v. Livingston*⁵ property subject to a power was appointed to trustees to pay the income to A., who was not born at the time of the creation of the power, till he reached forty-five, and then to transfer the capital to him absolutely, but if he died before that age, to transfer the property

¹ As all B.'s appointees were in fact born in the testator's lifetime, and as the share of each went over independently, not only were the life estates good, but the gifts over were good also. See §§ 395, 523 *et seq.*, *post*.

If any of the appointees had been born after the testator's death, the restraint on the alienation of their shares was either good or ought to have been disregarded. See the following section.

It is to be observed that the effect of holding the gifts over to be void was to give the children of B., under a provision in default of ap-

pointment, the whole interest in what, under the appointment of B., they took a life interest, and the question of the validity of the life interests may have therefore less attracted the attention of the Court.

² 136 Pa. 354, 366. See also *Coggins' Appeal*, 124 Pa. 10, 30; *Ronckendorff's Estate*, 11 Pa. C. C. 447; *Owen's Pet.*, 3 Pa. Dist. C. 328.

³ 13 W. N. C. (Pa.) 315; s. c. 16 Phila. 264.

⁴ See §§ 432-438, *post*.

⁵ 4 Sandf. S. C. 539.

to his next of kin. The Court held the whole appointment void. No opinion is reported, but the reporter says one was given orally, and went upon the ground stated in the head-note, which is "that the appointment was void because it suspended the absolute ownership of the personalty bequeathed beyond the period allowed by law before the Revised Statutes." The gift over was bad, but the appointment of the equitable interest to A. until he reached forty-five, if he lived so long, was an interest beginning within the required limits, and therefore good. The expression about "suspending the absolute ownership" is borrowed from the Revised Statutes, and is foreign to the conceptions of the common law.¹

§ 242. In *Thorndike v. Loring*² a fund was given by will to trustees to accumulate for fifty years, and then to pay over to those who would be entitled to the testator's estate if he had then died intestate. The short memorandum of the opinion says: "The gift to trustees was void for remoteness. . . . The gift being void in law, the gift by the residuary clause takes effect, and the residuary legatees are entitled to distribution." The residuary legatees were certainly entitled to distribution, but the mode by which that result was reached is perhaps not quite correctly stated. The term for fifty years was not too remote, although the gift over was.³ The residuary legatees, therefore, took the property subject to the term, and having the whole interest they could stop the accumulation and demand a conveyance at once.⁴ The same comment is applicable to *Fosdick v. Fosdick*,⁵ which is discussed in the following sections on another point. It may also be fairly urged

¹ See § 748, *post*. The case is so imperfectly reported, that it is not clear what A. took, the appointment over on his reaching forty-five being invalid. If the fee came to him, then as he had the entire equitable interest he could compel an immediate transfer to himself.

² 15 Gray, 391.

³ *Gooding v. Read*, 4 De G. M.

& G. 510. *Re Watson*, [1892] W. N. 192. *Re Wise*, [1896] 1 Ch. 281. *Rhodes's Estate*, 147 Pa. 227. *Johnston's Estate*, 185 Pa. 179. See *Andrews v. Lincoln*, 95 Me. 541; *O'Brien's Estate*, 24 Vict. L. R. 360. See § 232, *ante*.

⁴ See § 671, *post*.

⁵ 6 Allen, 41.

in support of the decision in *Thorndike v. Loring* that the trust was created solely for the purpose of making an invalid gift, and that its sole object being illegal the whole trust failed.¹

§ 243. In *Fosdick v. Fosdick*² a testatrix gave the residue of her estate to trustees in trust to accumulate the income until her youngest living grandchild should reach twenty-one, and then "to pay over annually to my grandchildren, in equal shares, all the annual interest and income of said trust fund or estate." She then directed to whom each grandchild's share of income should be paid in case of its death, and that the interest and income should continue to be paid during the life of the last survivor of the grandchildren, and on the death of such last survivor she gave the property over. It is clear that the equitable life interests of the grandchildren must vest within twenty-one years after lives in being at the death of the testator, and they therefore seem to be good, although the gifts over on the death of the grandchildren are of course bad. But the Court held the life estates of the grandchildren to be void, for a singular reason. They say that no portion of the annual interest and income "will or can become payable to any one of the legatees until the end of one year after the fund itself is created and established; for no annual interest can before that time have accrued upon it. And until that time it is impossible that any part of such income can become legally vested in any one to whom any portion of it is bequeathed, because until the arrival of that time it is and must remain uncertain who are the legatees who will then be entitled to receive it; for according to the provisions in the will the share or portion which each one of the grandchildren would, if living, be entitled to receive is, upon his or her death, bequeathed and to be paid either to the surviving brothers and sisters, or the surviving wife or husband, or

¹ A like decision in a like case was made in *Baker v. Stuart*, 28 Ont. 439.

² 6 Allen, 41.

the children, or the appointees under the will of the deceased, as certain particularly enumerated and prescribed events and contingencies shall or shall not occur. Thus it may happen that the earliest possible time when any portion of the interest or income of the accumulated fund can become vested in any one of the legatees may be twenty-two years after the birth of a child born after the death of the testatrix; and the end of this term of twenty-two years may be more than twenty-one years and ten months after the extinction of all said lives in being, that is, after the death of all of said grandchildren who were living at the time of the decease of the testatrix.”¹

§ 244. In *Lovering v. Worthington*² the Court say that in *Fosdick v. Fosdick* “property was bequeathed to trustees to be accumulated for a term which the Court held to be longer than the period prescribed by the Rule against Perpetuities.” But this is not so; the period during which the property was to be accumulated was only a life in being and twenty-one years. The fact that in *Fosdick v. Fosdick* the life interests of the grandchildren did not begin till twenty-one years after a life in being did not make them bad. As appears by the cases cited § 232, *ante*, it has been repeatedly held in Massachusetts, as elsewhere, that a life interest beginning at the end of a life in being is good. Such life interest may extend beyond twenty-one years, and yet there has never been a suggestion that that part which fell beyond twenty-one years is bad, and *Gooch v. Gooch*³ is a distinct authority to the effect that a life interest beginning at the expiration of lives in being and twenty-one years is good. Neither is it any objection that the life interest is merely an equitable one, entitling the *cestui que trust* only to the receipt of the income; for this has been so in the great majority of the cases where life interests to unborn persons have been supported.⁴

§ 245. Nor does the decision in *Fosdick v. Fosdick* purport to rest upon any of these grounds, but because “the ‘annual’

¹ 6 Allen, 41, 46.

² 106 Mass. 86, 88.

³ 3 De G. M. & G. 366, 383.

⁴ See cases cited, § 232, *ante*.

interest and income of [the fund] is to be 'annually' paid over to and received by the respective legatees." The adjective "annual" adds absolutely nothing, in this connection, to the words "interest and income." Neither the amount to be received by the *cestuis que trust*, nor the time nor mode of receiving it, is in the least affected by the use of this word. Were it stricken out the sense would not be in any way changed. The effect attributed to this expression in rendering the gift too remote must lie in the words "annually paid over and received." The utmost force that can be attributed to the word "annually" is that the trustee need not pay over the income more than once a year. As soon as received by the trustee it belongs to the life tenant. Should the life tenant die in the course of the year, any dividends or interest received before his death belong to him. The fact that the life tenant may not be alive at the end of a year, to which the opinion refers, is nothing more than may happen in any life estate, and will not deprive the life tenant of income accrued before his death. The Court treat the gift as if it had been "to such of certain persons as are living at the end of one year after my youngest grandchild reaches twenty-one, and so on at the end of every year so long as any one of my grandchildren is alive." Such a gift would have been too remote, for it would have been contingent on the condition precedent of a legatee being alive twenty-two years after lives in being; but that was not the gift in *Fosdick v. Fosdick*. The gift there was free from any condition precedent, and was vested in, and (if that be material) immediately alienable by the grandchildren. If a life interest in any property is to be considered contingent except as to those instalments of income which have actually been received, then all that part of a life estate beginning at the determination of a life in being which falls beyond twenty-one years from its commencement is bad for remoteness; but in the numerous cases in which such life estates have been held good without qualification, no such suggestion has ever been heard. It is confidently submitted that *Fosdick v. Fosdick* was wrongly decided.

§ 245 a. In *Towle v. Doe*¹ a testator gave the residue of his estate to his wife for life and on her death "to my children, viz.: Wm. M. Towle and his heirs, one-fourth part to be invested by my executor in United States bonds or State bonds, and the interest, deducting expenses, paid over to said Wm. M. Towle and his children so long as they live, and then the principal divided to his or their heirs." The Court held that Wm. M. Towle took a fee subject to a modifying clause, and that as the modifying clause created interests which were in part too remote, such clause, in accordance with the doctrine laid down, Chapter XIII., *post*, must be rejected. This, though rather an extreme application of that doctrine, may be accepted, but the Court seems to have thought that not only the final gift to the heir or heirs of Towle and his children was void, which was enough to support the decision, but also that the trust for Towle and his children during their lives was bad. This, it is respectfully submitted, was erroneous.

§ 245 b. *Troutman v. De Boissiere*.² Land was conveyed by deed to trustees to hold in trust to provide a home and school for the orphan children of deceased Odd Fellows of the State of Kansas. The Supreme Court of Kansas, by four judges to three, held that this was not a charitable trust and was void. Whether this was a charitable trust is not a question to be discussed here. If it was not charitable, it was certainly void, because there was no *cestui que trust* who had a standing in Court to enforce it.³ But the Court seemed to think the case had something to do with the Rule against Perpetuities. They say (p. 4), "That the foregoing deed is void on its face, unless the trust it attempts to create is a public charity, is beyond controversy, for it violates the rule against perpetuities of title in estates."⁴

¹ 97 Me. 427.

² 66 Kan. 1.

³ This is the familiar and well-established doctrine of *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 521. See App. H, § 894

et seq., post; 15 Harv. Law Rev. 509.

⁴ Mr. Justice Cunningham, in his dissenting opinion, expounds lucidly the true nature of the Rule against Perpetuities, and shows

§ 245 c. (III.) *The Maryland cases in which life estates to unborn persons and equitable fees have been said or held to be void as violating the Rule against Perpetuities.*

(1) *Barnum v. Barnum*¹ (1866). Here there was a devise to trustees in trust for children and their heirs, with a direction that the property devised should be permanently carried on as a hotel, and (as the Court interpreted the will), if the testator's views on this point were disappointed, judicially or otherwise, he devised the property over. The Court held that the trust for the children was void, and the "disappointment clause" took effect. Though the trust would seem to have been good, yet as it was terminable at the will of the *cestuis que trust*, it might fairly be said that the testator's views were disappointed. There is therefore no occasion to quarrel with the decision, but the Court, disregarding or overlooking the fact that an equitable fee is alienable, and that the Rule against Perpetuities applies only to future estates, said (p. 171): "In the case now under consideration, no question is presented as to the future vesting of an executory estate, in order to determine the validity of the preceding one; but simply whether the trusts of the will require in their execution a longer period than that prescribed by the Rule against Perpetuities, and, therefore, render the property devised to the trustees inalienable during that time. If so, the law denounces the devise in trust as a perpetuity, and declares it void." And this *dictum* has since been carried out by the Court of Appeals in a series of cases in the face of difficulties with a courage which extorts admiration.

(2) *Deford v. Deford*² (1872). A testator devised property to trustees to apply and use the income in the support, education, and maintenance of such granddaughters as he then had or might thereafter have, or might at any time thereafter descend from any of his children, for the equal benefit of said granddaughters during their respective lives; said trust to be

that the case before the Court in ¹ 26 Md. 119.
no way involved its consideration. ² 36 Md. 168.

continued for the benefit of the said granddaughters so long as three at least of them were living, but no longer, and the property then to be divided among the granddaughters then living, and the heirs and distributees of such as had previously died, *per stirpes*; the income during the continuance of the trust to be divided between the granddaughters who might be living, and the child or children, descendant or descendants, of such as might die during said trust, leaving at the time of death any descendants, *per stirpes*. As all the grandchildren must be living at the time of the death of the testator's children, it would seem as if there was here a good estate to all the grandchildren, to last during the joint lives of all the grandchildren so long as three of them were alive. The limitation over when there are two only of the granddaughters alive was bad; so also, of course, was any gift to the children of a grandchild or any increment to the share of a grandchild upon the death of any other without issue. In fact, it seems as if each grandchild took a good life interest, and that all modifications or divestings of it were too remote. But it was held that as the trust might continue beyond the limit fixed by the Rule against Perpetuities it was bad.¹ The Court said they regarded *Barnum v. Barnum* "as a binding and conclusive authority which must, notwithstanding the very able argument of counsel to the contrary, control our judgment in the present case."

(3) *Goldsborough v. Martin*² (1874) is stated below.³ In it the language of *Barnum v. Barnum* was again cited with approval.

(4) *Heald v. Heald*⁴ (1881). Here equitable life estates to the unborn children of the testator's son were, in accordance with the general and correct doctrine⁵ held to be good. *Barnum v. Barnum* was not referred to.

¹ Cf. *Allen v. White*, 16 Ala. 181, and *Johnston's Estate*, 185 Pa. 179, § 249 b, *post*.

² 41 Md. 488.

³ § 397, *post*.

⁴ 56 Md. 300.

⁵ See § 232, *ante*.

(5) *Albert v. Albert*¹ (1887). In this case precisely the opposite decision was made, and devises of equitable life interests to the unborn children of a son were held to be bad. *Heald v. Heald* was not referred to by either counsel or Court, and one would not have hesitated to consider the decision in *Albert v. Albert* a mere slip of the learned Court, were it not for the following case.

(6) *Thomas v. Gregg*² (1892). Here precisely the same doctrine was laid down as in *Albert v. Albert*, although the Court made no reference either to that case or to *Heald v. Heald*. They say: "The Rule against Perpetuities is as clear and distinct as any other rule, which has ever been declared by the Courts. There have sometimes been serious questions and difficulties in the application of the Rule to the terms of particular instruments; but no difference of opinion exists as to the terms of the Rule. It is very well expressed in *Barnum v. Barnum*. 'If an estate be so limited as by possibility to extend beyond a life or lives in being at the time of its commencement, and twenty-one years and a fraction of a year (to cover the period of gestation) afterwards, during which time the property would be withdrawn from the market, or the power over the fee suspended, it is a perpetuity, and void as against the policy of the law which will not permit property to be inalienable for a longer period.'" The Court, in fact, though saying that no difference of opinion existed as to the Rule, adopted a fundamentally wrong conception of its nature by supposing that the period fixed by the Rule had reference not to the beginning but to the end of estates. The position of the Court that the decisions made in *Albert v. Albert* and *Thomas v. Gregg* were the necessary consequence of the doctrine laid down in *Barnum v. Barnum* seems incontrovertible, but the fact that such decisions were contrary not only to their own case of *Heald v. Heald*, but to the decisions in other common-law jurisdictions, would, one would suppose, have led them to question the correctness of that doctrine.

¹ 68 Md. 352.

² 76 Md. 169.

(7) *Missionary Society v. Humphreys*¹ (1900). A devise was made to trustees and their successors to apply the rents from year to year to a number of incorporated bodies and boards for charitable purposes. The Court held the trust void and declared that they felt "constrained to adhere to the law as announced in" *Barnum v. Barnum*. Surely this is the *reductio ad absurdum* of the doctrine of *Barnum v. Barnum*. The Court expressly say that a devise directly to the charitable bodies would have been good. That is: A devise of a legal fee to a charity is good, but a devise of an equitable fee violates the Rule against Perpetuities.²

(8) *Trinity Church v. Baker*³ (1900). Here was a devise to trustees upon trust to convey land to a charitable organization, upon its complying with a condition precedent, which compliance might be at a remote period. Remembering that the doctrine of *cy pres* does not prevail in Maryland, there seems nothing to criticise in this decision, though it is not always easy to follow the reasoning of the Court.

(9) *Lee v. O'Donnell*⁴ (1902). Devise to trustees to hold in trust for A. for life, and if he died without issue living at his death (which happened) to hold for B., C., and D., and their heirs as tenants in common. Of course B., C., and D. were entitled to have the legal estate conveyed to them, but the Court said: "If the trusts in this case are not to terminate at this point of time [the death of A.], they must be held as void, as tending to create a perpetuity."⁵ This case brings out into sharp relief the difference between what it is submitted is the true rule and the doctrine as laid down in the Maryland cases, the former being that equitable fees are alienable, the latter being that they are void *ab initio*.

§ 245 *d.* The mistake of applying the Rule against Per-

¹ 91 Md. 131.

² 91 Md. 539.

³ See also *Bennett v. Humane Impartial Soc.*, 91 Md. 10; *Woman's Foreign Missionary Soc. v. Mitchell*, 93 Md. 199; *Baltzell v. Church Home*, 110 Md. 244.

⁴ 95 Md. 538.

⁵ See *Hillen v. Iselin*, 144 N. Y. 365.

petuities to the termination instead of to the beginning of an estate has been committed by several learned judges and Courts, for instance, by Sir John Leach, M. R., by the Supreme Court of Maine, and by the Supreme Court of Pennsylvania, but they have all owned their error or reversed their rulings.¹ Is it too much to hope that the Court of Appeals of Maryland, to which the profession throughout the country has been in the habit of looking for a sound exposition of the law of property, will follow their example? ²

§ 245 *e*. Since the above was written, that hope seems to have been fulfilled. In *Graham v. Whitridge*³ (decided in March, 1904), A. left a share of the residue of his estate to trustees in trust, on the death of his daughter B. without leaving issue, to hold said share and the income thereof to or for such of the testator's other children or their descendants and for such estates as B. might by will appoint. B. died childless, and by will appointed the said share to eight children of her nephew, "the income only therefrom to be paid respectively to each said child during her or his natural life, with remainder over to her or his" descendants. None of the appointees had been born at the death of the testator. The Court, repudiating *sub silentio* the doctrine of *Albert v. Albert* and *Thomas v. Gregg*, went back to the doctrine of *Heald v. Heald*, and held that, although the gifts over on the death of the nephew's children were bad, the life interests of the children themselves were good. The case came again before the Court in June, 1904,⁴ when it was held that the nephew's children took legal and not equitable life interests,⁵ but no suggestion is made that the decision

¹ See §§ 232, 235, 239, *ante*.

² An elaborate and learned note on the Rule against Perpetuities in Maryland by Eli Frank, Esq., of the Baltimore Bar, will be found in the 26th volume of Perkins's edition of Maryland Reports, p. 119.

³ 99 Md. 248. See 18 Harv. Law Rev. 232.

⁴ *Graham v. Whitridge*, 99 Md. 290.

⁵ This seems very questionable. The Statute of Uses does not apply to personalty, of which the residue, in part at least, apparently consisted. Besides, the property was given to trustees to hold to and for such persons and on such estates as B. might appoint. B. appointed

of this question either way would have had any effect on the validity of the interests.¹

§ 245 *f*. The Supreme Court of Maryland has now taken another step in returning to the Common Law. In *Brown v. Reeder*² land was conveyed by A. to B. and his heirs for their own use, but in trust for A. for life, and on his death for C. and his heirs. After the death of A., C.'s heir brought a bill in equity for a conveyance, and a conveyance was decreed. This appears to put the case on the correct ground. The Court distinguish *Barnum v. Barnum* and the following cases, because in them there were provisions imposing active duties on the trustee, but if the *cestui que trust* has the equitable fee, such provisions are void, without any question of perpetuities, as being against public policy.³

§ 245 *g*. But again the Court turned its back on the Common Law. In *Reed v. McIlwain*⁴ A. devised property in trust for his daughter B. for life; and on B.'s death she had a general testamentary power; in default of appointment, the property was to go to the heirs of B. B. had four children, C., D., E., and F. She appointed by will one-fourth of the fund to C. in fee, another fourth to D. in fee, another fourth to E. for life without power of anticipation, and on her death over, and another fourth to F. for life without power of anticipation, and on her death over. C., D., and E. were born before, but F. after, A.'s death.

A bill in equity was brought by F., alleging that the appointment for her with the limitations over violated the Rule against Perpetuities and was therefore void; that the invalidity of the appointment for F., if the other appointments were up-

the property to certain children and directed "the income only therefrom to be paid respectively to each said child" for life, with remainder to its descendants. And no sooner had the Court decided that the estates were legal, than they had to take them away from the legal owners and give them to new trustees, in order to carry out

the intentions of the testator and of the donee of the power. See 18 Harv. Law Rev. 234.

¹ But see *Missionary Society v. Humphreys*, 91 Md. 131, § 245 *c* (7), *ante*.

² 108 Md. 653.

³ See Gray, *Restraints on Alienation*, §§ 105 *et seq*.

⁴ 113 Md. 140.

held, would defeat the whole scheme of B.'s will; that all the appointments by her should be declared void; and that the property should go in default of appointment. The defendants, being the other children of B., or their heirs or representatives, answered, denying the contention of F. so far as it affected the appointments to such other children. The Court decreed the appointment to F. "to be void because in violation of the Rule against Perpetuities" and decreed the entire execution of the power to be void. The defendants appealed.

§ 245 *h*. The Court of Appeals say that the defendants concede F.'s contention that the appointment to F. "violates the Rule against Perpetuities, and is for that reason void, and it would seem no other conclusion could be reached."

The Court say that the validity of the appointment to F. must be read as if inserted in A.'s will.¹ Assuming this to be true, as it probably is, and reading the limitation to F. for life as inserted in A.'s will, such limitation, according to the Common Law and to *Graham v. Whitridge*,² is good, though of course the limitation over on F.'s death is invalid. But it was conceded, strangely, by the defendants that the limitation to F. for life was invalid, so that the case is no authority upon the point.³

§ 245 *i*. The Court then refer to the clause restraining anticipation, and say this limitation transgresses the Rule and is for that reason void. Whether a clause against anticipation attached to a life estate like F.'s is void, or can be enforced, has been much discussed,⁴ but it has never been suggested that such clause renders the estate void.

§ 245 *j*. The point of the remoteness of F.'s life estate being out of the way by concession, the question before the Court was whether the fact that the appointment of one share was

¹ But cf. §§ 526 *et seq.*, *post*.

there was a similar concession,

² 99 Md. 248, see § 245 *e*,
ante.

§§ 394, 394 *a*, *post*.

⁴ See §§ 432 *et seq.*, *post*.

³ See the history of a case where

invalid thereby rendered bad the appointments of other shares, good in themselves? The correctness of the decision on this point is questionable.¹

§ 245 *k*. The cases of *Graham v. Whitridge* and *Brown v. Reeder* gave reason to hope that, — borrowing a figure from another profession, — what we may call the *virus* of *Barnum v. Barnum* had been eliminated in Maryland from the system of property law, but *Reed v. McIlwain* showed that it still lingered there.²

§ 245 *l*. But now again the Court of Appeals has gone back to the Common Law. In *Gambrill v. Gambrill*,³ a testator, who died in 1856, gave property in trust for his daughter E. for life, and on her death as she might by will appoint. E. married in 1869 and died in 1872, and by will appointed the property to her husband for life, and on his death to G., her only child, for life, with limitation over. The Court held that the limitation over was of course void, but that the life estate to G. was good. They said that the Rule against Perpetuities “is applicable to limitations of either legal or equitable estates in either real or personal property. It relates to the *commencement* of future interests, and not to their *duration*, and it is therefore immaterial whether the estate limited is in fee, for life, or for years.” They rely on *Heald v. Heald* and *Graham v. Whitridge*. They disapprove of *Thomas v. Gregg* and *Reed v. McIlwain*. They say that in those cases “the principle of the *Barnum Case* was construed and applied as confirming the *duration* of a trust within a life or lives in being and twenty-one years thereafter, and not as merely restricting the future vesting of an estate within that period. This theory of the rule is not in accord with its purpose and effect as defined in the earliest decisions of this court on the subject and in its statement in the recent cases of *Levenson v. Manly*,⁴ *Starr*

¹ See § 537, *post*.

³ 122 Md. 563.

² Cf. *Levenson v. Manly*, 119 Md. 517; *Lyon v. Safe Deposit Co.*, 120 Md. 514.

⁴ 119 Md. 517.

v. *Starr M. P. Church*,¹ and *Hollander v. Central Metal Co.*,² as well as in the cases of *Heald v. Heald* and *Graham v. Whittridge*, to which we have more particularly referred. As we adhere to the principle of the rule as there expressed, and find it controlling in the present case, we must hold that this [limitation for the life of G.] is not in violation of the Rule against Perpetuities."

§ 246. Equitable life estates beginning within the limits of the Rule against Perpetuities are good;³ but suppose, as, for instance, to save property from creditors, that it is given to A. and his heirs in trust to pay the income to B. for life, and on B.'s death to pay the income among such of B.'s (unborn) children during their lives as the trustee and his heirs may in his or their discretion think fit, or at his or their discretion to add the income to the principal. Here, in order to give any interest to any child, or in order that any sum should be added to the principal, the trustee and his heirs must exercise his or their discretion to that end; the exercise of such discretion is a condition precedent, and as that discretion may not be exercised in that way till too remote a period, perhaps the whole gift upon B.'s death is void.⁴ And so, even if there is no discretion to add the income to the principal, but only a discretion to distribute; for though the whole class have a vested right, yet the share of each member depends upon the prior exercise of discretion by the trustee.⁵ Perhaps such a gift to unborn children may be held good as a gift to them in equal shares, the discretion to modify the amount of the shares and to add any part of the income to the principal being rejected.⁶ This suggestion cannot be accepted in all cases. To reject a modification, there must be an independent gift,⁷ and often there is none such. If the trustee can pay over the income at such

¹ 112 Md. 171, 182.

² 109 Md. 131, 157.

³ See cases cited, § 232, *ante*.

⁴ See *Andrews v. Lincoln*, 95

Me. 541. But see § 410 *a*, *post*.

⁵ See also the case of *Moore v.*

Moore, 6 Jones, Eq. 132, discussed, § 396, *post*.

⁶ See § 439, *post*; 1 Jarm. Wills (6th ed.) 308.

⁷ § 431, *post*.

time as he sees fit, that time may be too remote, and therefore the discretion may be void.¹ But suppose, as may often be the case, the trust is to pay the income every year to such children, now unborn, as he sees fit, is such trust wholly void, or is it good for twenty-one years, on the ground that the annual payments are separable? On this see § 410 *a, post*.

11. *Effect of Interests being too Remote.*

§ 247. (1) *Effect on Prior Limitations.*—If future interests created by any instrument are avoided by the Rule against Perpetuities, the prior interests become what they would have been had the limitation of the future estates been omitted from the instrument. Thus, if an estate is given to A. for life, remainder to his children and their heirs, but, if the children all die under twenty-five, then to B. and his heirs, the limitation to B. is too remote, and the children of A. take an indefeasible fee simple. The cases illustrating this are innumerable.² So when there is a devise on a remote condition, and no prior devise, the land descends to the heir who has an indefeasible fee.³

§ 248. If the devise of a future interest is void for remoteness, but the prior devise is for life only or other limited period,—for instance, if there be a devise to an unborn child for life, remainder to the unborn child of such unborn child,—the property after the termination of the prior interest goes to the person to whom property which has been invalidly devised or bequeathed goes. This person is generally the heir in case of realty, and the residuary legatee in case of personalty. There is no difference in this respect between a devise or bequest void for remoteness and a devise or bequest void for any other reason.⁴

¹ See 1 Jarm. Wills (6th ed.) 308; § 232, note 7, *ante*.

² See, for example, *Brattle Sq. Church v. Grant*, 3 Gray, 142, 156 *et seq.*

³ See *Ferguson v. Ferguson*, 39

U. C. Q. B. 232; 1 Ont. Ap. 452; 2 Can. S. C. 497. Cf. *Re Daveron*, [1893] 3 Ch. 421; *Goodier v. Edmunds*, Id. 455.

⁴ *Andrews v. Rice*, 53 Conn. 566. *Tongue v. Nutwell*, 13 Md.

§ 249. In *Caldwell v. Willis*¹ there was a bequest of personalty to A. for life, with what was held to be a too remote limitation over. The Court contrived to reach the extraordinary result that A. took an absolute interest. They quoted a remark by Smith, C. J., in *Harris v. McLaran*,² that the estate of the first taker was absolute "in those cases in which an intention to dispose of the whole interest is apparent, and where also conditional limitations are engrafted upon interests in the first takers, which, in the absence of the conditional limitations, would be held to be absolute interests." What Smith, C. J., meant was that when the first taker takes an absolute interest subject to a conditional limitation, if the conditional limitation is too remote, the first taker retains his absolute interest. The Court in *Caldwell v. Willis* must have understood the remark to mean that if the interest of the first taker *plus* the void limitation was meant to carry the whole interest, then the first taker takes the whole interest. That the remark of Smith, C. J., could have been so misunderstood, and that so misunderstood it could have been supposed to be law, seem equally inconceivable; but *Caldwell v. Willis* is not otherwise intelligible.³

§ 249 a. Some recent cases in which the invalidity for re-

415. *Deford v. Deford*, 36 Md. 168. Cf. *Wainman v. Field*, Kay, 507; *Blight v. Hartnoll*, 23 Ch. D. 218; *Loyd v. Loyd*, 102 Va. 519. There is no question that personal property included in a void bequest goes to the residuary legatee. *Shanley v. Baker*, 4 Ves. 732. *Cox v. Harris*, 17 Md. 23. *Deford v. Deford*, *ubi sup.* 1 Jarm. Wills (6th ed.) 945. The better opinion seems to be that void devises, like lapsed devises, go to the heir. 1 Jarm. Wills (6th ed.) 946. *Van Kleeck v. Reformed Dutch Church*, 6 Paige, 600; 20 Wend. 457. *Greene v. Dennis*, 6 Conn. 292. *Lingan v.*

Carroll, 3 H. & McH. 333. *Tongue v. Nutwell*, *ubi sup.* See *Tregonwell v. Sydenham*, 3 Dow, 194. *Contra*, *Ferguson v. Hedges*, 1 Harring. 524. And see *Hayden v. Stoughton*, 5 Pick. 528, 536 *et seq.* Often, by modern legislation, lapsed and void devises go to the residuary devisee. 1 Vict. (1837) c. 26, § 25. *Thayer v. Wellington*, 9 Allen, 283. See *Massey's Appeal*, 88 Pa. 470.

¹ 57 Miss. 555.

² 30 Miss. 533, 570.

³ As to an equally strange resolution on another point in this case, see § 398, *post*.

moteness of a subsequent limitation has been held to destroy prior limitations also, call for notice. The first of them is *Lockridge v. Mace*.¹ In this case there was a devise to the testator's wife for life, remainder to his children for life, remainder to his grandchildren for life, remainder to his great-grandchildren in fee. The Court of course held the last limitation void. It then asks the question whether all the life-estates "share the fate of the clause which attempts to give to the great-grandchildren an estate in fee, or is the will void, only in so far as it exceeds the limitation prescribed by law?" It then proceeds to cite authorities and concludes thus: "Guided by these authorities, it must be held" that the devise "must fail *in toto*." But in fact none of these authorities support the conclusion of the Court.² And if anything is now well settled in the law it is that a life estate, good in itself, is not destroyed by the remainder over being bad for remoteness or any other reason.³ Even where the life estates are to unborn persons they are good. In Mr. Lewis's words "it occasions surprise to find the question treated as in any way doubtful or open to argument."⁴ Sir John Leach, M. R., in *Hayes v. Hayes*,⁵ held a life estate to an unborn person to be bad, but he lived to regret it.⁶ In the preceding edition it was said: "It is confidently to be

¹ 109 Mo. 162.

² They are *Leake v. Robinson*, 2 Mer. 363; *Donahue v. McNichol*, 61 Pa. 73, 78, 79; *Hawley v. James*, 16 Wend. 120, 121, 126; *St. Armour v. Rivard*, 2 Mich. 294; 2 Lead. Cas. in Amer. Law of Real Prop. 488. The first three have nothing to do with the subject. In *St. Armour v. Rivard* (see § 665, *post*) there seems to have been an estate-tail (in Michigan by statute an estate in fee simple) with a proviso that each tenant should hold for life only; this proviso was declared invalid. The reference to 2 Lead. Cas. in Amer. Law of Real Prop.

488, is to an editorial note based on a mistaken view of *St. Armour v. Rivard*.

³ Take, for instance, four cases from as many different jurisdictions. *Stuart v. Cockerell*, L. R. 5 Ch. 13. *Wood v. Griffin*, 46 N. H. 230. *Lovering v. Worthington*, 106 Mass. 86. *Stout v. Stout*, 44 N. J. Eq. 479. See *Lewis*, *Perp. Suppl.* 144; *Marsden*, *Perp.* 174, 175; *Perry*, *Trusts* (6th ed.) § 377, note.

⁴ *Perp. Suppl.* 144.

⁵ 4 Russ. 311.

⁶ See § 232, *ante*.

hoped that the learned Court of Missouri will come into line." But this hope has been disappointed; in *Shepperd v. Fisher*,¹ *Lockridge v. Mace* was followed.

§ 249 *b*. The next case is *Johnston's Estate*.² A testator devised land to trustees for a term of seventy-five years, to pay debts and legacies out of the income, and then on each 1st of May to divide the income "among all my children share and share alike and the children of such of my children as may during said period depart this life, the children of such deceased children to have and take however only such portion and share of said rents, issues, and profits as their deceased parents would have taken if living; the said mode of distribution to obtain also in regard to said rents, issues, and profits, among descendants of more remote degree than children's children;" and at the expiration of the term of seventy-five years, the land to be sold and the proceeds distributed among all of his children then living, and the issue of those then dead. One of the testator's heirs brought a bill to set aside the trust, and obtain possession of a share in the land.

The case was heard in the Court of Common Pleas by Stewart, P. J., who delivered a very lucid opinion, granting the prayer of the bill, and the decree was affirmed in the Supreme Court, that Court adopting Stewart, P. J.'s, opinion. The learned judge held that the devise of the trust term for years was good in itself and that the circumstance that it would continue seventy-five years was immaterial. He then held that the gift over at the end of the seventy-five years was contingent, and therefore, of course, too remote. But he went on, and decided that although the term for years was good in itself it was bad *because* the contingent gift over at the expiration of the term was too remote. He admitted (p. 191) that "no cases are to be found in Pennsylvania supporting" this view, and he relied on three New York cases, and on *Thorndike v. Loring*.³

¹ 206 Mo. 208, 245-247.

³ 15 Gray, 391; § 242, *ante*.

² 185 Pa. 179.

The New York cases were all decided, not at common law, but under the peculiar provisions of the New York Statutes.¹ The difference between *Thorndike v. Loring* and *Johnston's Estate* is this: In the former case the income was to be accumulated for fifty years in order that at the end of that time the accumulations might be given over, but the gift over was too remote, and could never take effect, therefore the object of the trust wholly failed; but in the latter case the object of the trust was not solely for the purpose of the remote gift over, — in fact, it had nothing to do with the gift over, — it was created solely to regulate the payment out of income during the seventy-five years. It would have effected its purpose had there been no gift over at all. There is a series of English cases opposed to *Johnston's Estate*,² and on the whole, with great submission, the decision seems difficult to maintain.³

§ 249 *bb.* *Johnston's Estate* has now been followed in *Gerber's Estate*⁴ and *Kountz's Estate*.⁵ The learned reader is referred to a severe but just criticism on the three cases by Mr. Foulke.⁶

¹ By N. Y. Rev. Sts. pt. 2, c. 1, Tit. 2, §§ 14, 15, 23, 63, and c. 4, Tit. 4, §§ 1, 2, as revised by c. 547 of the Laws of 1896, §§ 32, 39, 83, and c. 417 of the Laws of 1897, §§ 2, 3 (Birdseye's Gen. Laws (3d ed.), 3019, 3020, 3027, and 2631, 2632), all estates are void which suspend the power of alienation for more than two lives, and all trust estates are inalienable, therefore in New York such a term as existed in *Johnston's Estate* would be, of course, bad.

² *Gooding v. Read*, 21 Beav. 478; 4 De G. M. & G. 510. *Re Watson*, [1892] W. N. 192. *Re Wise*, [1896] 1 Ch. 281.

³ The passage in the text is quoted with approval in *Lyons v. Bradley*, 168 Ala. 505, 521.

Although the reason given by Stewart, P. J., for invalidating the trust term seems insufficient, yet were not the trusts of the term, in part at least, bad? On each 1st of May for seventy-five years the income was to be divided among the children then living, and the issue *per stirpes* then living of children then deceased; the persons taking and the size of the shares at each period of distribution could not be determined until such period, which might be long after the limits fixed by the Rule against Perpetuities. On the question whether such trusts could be sustained in part, see §§ 410 *a*, *et seq.*, *post*.

⁴ 196 Pa. 366.

⁵ 213 Pa. 390.

⁶ Treatise, §§ 472-476.

§ 249 c. The third case is *Eldred v. Meek*.¹ Here property was given to three of the testator's grandsons by name upon their becoming, respectively, twenty-five years of age; subsequent clauses provided that if any of the grandsons died without leaving children their shares should go to the survivor and survivors upon their reaching twenty-five, and then another clause provided that if any grandson should die before arriving at twenty-five leaving children, then such children becoming twenty-five years of age respectively should take their father's share. This gift to the children of the grandsons upon their attaining twenty-five was too remote, but the Court went on and held that the gifts to the grandsons were bad also. The Court rely on *Johnston's Estate and Lawrence v. Smith*,² and on New York decisions under statutes. *Eldred v. Meek* has been followed in *Pitzel v. Schneider*.³ Cf. *Reid v. Voorhees*.⁴

§ 249 d. The Supreme Court of Illinois has often distinctly recognized that a limitation is not void because it is followed by a remote limitation;⁵ but the Court distinguished the cases mentioned in the preceding section on the ground that where provisions in themselves valid are inextricably connected with invalid provisions the whole must fail. Undoubtedly this is a possibility,⁶ but it is submitted that the application of such a doctrine in those cases went too far.⁷

§ 249 e. *Lawrence v. Smith*⁸ is not a case of prior and subsequent limitations, but may conveniently be discussed here. The testator gave all his estate to trustees in trust to pay annuities to certain persons, including two sons and a daughter;

¹ 183 Ill. 26.

² § 249 e, *post*.

³ 216 Ill. 87; and also in *Dime Savings Co. v. Watson*, 254 Ill. 419, 427; and *Barrett v. Barrett*, 255 Ill. 332.

⁴ 216 Ill. 236.

⁵ *Howe v. Hodge*, 152 Ill. 252. *Chapman v. Cheney*, 191 Ill. 574. *Reid v. Voorhees*, 216 Ill. 236.

Johnson v. Preston, 226 Ill. 447.

Quinlan v. Wickman, 233 Ill. 39.

⁶ Cf. *White v. Allen*, 76 Conn. 185; *Lepard v. Clapp*, 80 Conn. 29; *Russell v. Hartley*, 83 Conn. 654, 659.

⁷ See *Kales*, *Fut. Int. in Ill.* § 183.

⁸ 163 Ill. 149, affirming *Smith v. Lawrence*, 27 Chic. L. News, 155.

to pay to each of three of his daughters, A., B., and C., \$600 annually during her life, on her death to pay to each of her children \$300 annually until such child reached twenty-five and then to pay it \$10,000. After the payment of all these sums, he directed the principal of his estate to be paid and conveyed to his grandchildren then living. The testator died in 1892, leaving property, real and personal, worth about \$90,000. He left four daughters and three sons, — one of the latter was in prison under a life sentence and was expressly disinherited in the will. His three daughters aforesaid, A., B., and C., who at his death were respectively fifty-three, fifty-two, and forty-nine years, had among them five children, the oldest of whom was twenty-four and the youngest nine. His other children, all of whom were “of mature age,” had no issue.

§ 249 *f*. The Court held that the final gift over was too remote, and they also seem to have been of the opinion that the provisions for payment to the grandchildren until each reached twenty-five, and then the payment to each of \$10,000 were good so far as they concerned those living at the testator's death; but that if any children had been born, after the death of the testator, to A., B., or C., no one of such children could have taken the \$10,000. These determinations seem of unimpeachable correctness. The gifts to the testator's grandchildren were clearly separable, and one born in fact in the testator's life could take, though one afterwards could not.¹ But the Court came to the conclusion that inasmuch as the testator's intentions towards all possible children of A., B., and C. could not be carried out, the trust should not be carried out for those who actually existed.

§ 249 *g*. This decision is incomprehensible. The testator has by his will given \$10,000 apiece to five of his grandchildren, and the Court takes it away. For what reason? Is it because the gift is against public policy as too remote? or is it because, under the circumstances, the testator would not

¹ See § 389, *post*.

have wished them to take it? It is not for the first reason: the Court assumes and admits that the gifts are in themselves perfectly good. It must be, then, for the second reason, — that the testator would not have wished these grandchildren to take. Let us see how it would have presented itself to the testator on his deathbed, under all the circumstances. Suppose some one had said to him: “You have five grandchildren, their ages running from twenty-four to nine. They are the children of three of your daughters, the youngest of whom is forty-nine. You have given to each of the children of your three daughters \$10,000; the gift is good for all those grandchildren that you know; but if any grandchild is born after your death, it cannot take. The alternatives are these: If the will stands, these five grandchildren will get \$10,000 apiece, and the rest of your property will go to all of your heirs, — that is, your children — and they, including the convict, will get about \$6,000 apiece. If you destroy the will, none of the grandchildren will get a dollar, but your children, including the convict, will get over \$12,000 apiece. These (legally) possible grandchildren will get nothing either way. There is no time to make a new will. Shall the present will go into the fire or not?” Is it possible to doubt what the testator’s answer would have been? Is it conceivable that he would desire to deprive the grandchildren whom he has known and loved of his bounty because he could not do the same for some possibility whose chance of existence was a thousand to one? Such pedantic fanaticism of uniformity in a testator is incredible. The cases which establish the doctrine of independent gifts are, of course, entirely opposed to the doctrine of *Lawrence v. Smith*. The Court was probably influenced by the cases under the New York Revised Statutes.¹ It is much to be regretted that a learned Court, walking in the freedom of the Common Law, should put its neck under the yoke of the New York Statutes, or adopt arbitrary and irrational assumptions as to what testators would

¹ See § 249 *b*, *ante*.

have intended if they had known that their full intentions could not be carried out.

§ 249 *h*. In *Hewitt v. Green*¹ a testator bequeathed \$100,000 to his executors in trust to pay certain annuities out of the income; the rest of the income to be accumulated for his grandchildren, but when each grandchild should reach twenty-one the interest on his share to be paid to him until the youngest grandchild should reach twenty-five, when the principal should be distributed among the grandchildren then living, the share which any grandchild would have taken if then living to go to any issue he might have left at his death. The gift of the principal was, of course, too remote. Stevenson, V. C., said: "The limits of this opinion already too wide will not permit the minute discussion of this provision for the distribution of accumulated income and accruing income to adult grandchildren, or to consider the various questions in regard to that provision which might be raised. The whole matter may, I think, be disposed of by the proposition that the gift of income to the grandchildren is a mere incident to the tying up of the \$100,000 of the principal for their benefit when the youngest member of the class has reached the age of twenty-five years. When the main gift falls, the incidental gift falls with it." Disposing of the gift of income to the grandchildren when they reach twenty-one by calling it incidental, seems a rather rough and ready way of dealing with the question.

§ 249 *i*. See also *Reed v. McIlwain*.² As to the effect of a power or an appointment being too remote, see §§ 531-537, *post*.

§ 250. If a contingent event is too remote to serve as a condition precedent for a future estate, may it not yet serve as a condition subsequent to determine a present estate? Or, in other words, may not a contingent clause purporting to be a conditional limitation, though, on account of remoteness, inoperative to take effect as a conditional limitation creating

¹ 77 N. J. Eq. 345, 363.

² 113 Md. 140; § 245 *h*, *ante*.

a new estate, yet serve as a contingent termination of the prior estate? If the prior estate is for life or years, then it may be determinable by a contingent event, which yet is too remote to serve as the condition precedent of a subsequent estate. Such contingency may operate purely as a condition subsequent which in effect creates a special limitation of the preceding estate.¹ And if it is clear that the settlor or testator intended that on the occurrence of the event the prior estate should determine, whether the subsequent estate took effect or not, then on the happening of the event the prior estate will come to an end, although the subsequent estate is too remote.² But it will take clear language to show an intention to have the determining limitation taken separately from the remote gift. "When you find a forfeiture clause associated with a gift over, is it not reasonable to read them together?"³ If the prior estate be a fee simple the void conditional limitation cannot, it is submitted, thus operate as a contingent termination of the prior estate. The limitation purporting to be over to a third person cannot be a common-law condition, for that can be taken advantage of only by the grantor or his heirs by way of re-entry; and no right of re-entry in the heirs can be found in an express limitation over to a third person.⁴ And except by a condition, the only way in which a fee can now be cut short is by the creation of a new estate through a conditional limitation. Since the Statute *Quia Emptores* there can be no fee with a contingent termination, apart from a condition or conditional limitation.⁵ Therefore, if an estate is given to A. and his heirs until B.'s (unborn) children reach twenty-five, and then to such children, it cannot be contended that although the estate to B.'s children is too re-

¹ See *Adams v. Adams*, [1892] 1 Ch. 369, 376, and § 32 and note 2, *ante*.

² See *Lewis*, *Perp.* 173.

³ *Hodgson v. Halford*, 11 Ch. D.

959, 963. 2 *Jarm. Wills* (6th ed.) 1442, 1456.

⁴ And such a right of re-entry would be too remote, in the case supposed. § 299, *post*.

⁵ See §§ 31-41 *a, ante*.

mote, yet A.'s estate has come to an end when B.'s children reach twenty-five.¹

§ 251. (2) *Effect on Subsequent Limitations.* — When an interest is vested it is never too remote, although preceded by other interests which are too remote. In former editions it was said: "Thus if an estate is given (1) to A. for life, (2) to A.'s unborn child for life, (3) to the child of such unborn child for life, (4) to B. in fee, B.'s estate is good, although the remainder to the child of A.'s unborn child is too remote. So although the later interest is not vested at its creation, yet if it must become vested within the limits fixed by the Rule against Perpetuities, it will be good." But this is incorrect. A vested estate is an estate which is subject to no condition precedent except the termination of the precedent estates.² In the case put the estate to B. is subject to the condition precedents of (1) the death of A., (2) the death of A.'s unborn child, (3) the death of the child of A.'s unborn child. A. and A.'s unborn child have estates for life, but the gift to the child of A.'s unborn child being remote, said child has no estate; and therefore as B.'s estate is subject not only to the termination of the life estates of A. and of A.'s unborn child, but also to the contingency of the death of an unborn person who has no estate, the estate given to B. is too remote, and so it was held in *In re Mortimer*.³

§ 252. As all life interests to persons now in being must take effect, if at all, within lives in being, all such interests would seem to be good, although preceded by interests that are too remote. Thus suppose personalty is bequeathed to A., and if A. dies without issue then to B., and if B. dies without issue then to C. for life, and on C.'s death to D., B.'s interest is too remote; but although C. cannot take until both A. and B.'s issue are extinct, yet inasmuch as C.'s interest

¹ On limitations after equitable fees, see § 327, *post*.

² See §§ 8, 101, *ante*.

³ [1905] 2 Ch. (C. A.) 502. A

note by the author, 23 Law Quart. Rev. 127, is wrong. See 1 Jarm. Wills (6th ed.) 352-354.

must come into possession in his lifetime, if it comes at all, it would seem as if it were not too remote; while D.'s interest, not being limited to his life, is again too remote. So if property is devised to A. for life (or for ninety-nine years if he live so long) and then to his first son (then unborn) for a like estate, followed by remote limitations, and then to C., a living person, for a like estate, the gift to C. seems not too remote. There are decisions, however, that in such a case C.'s estate would be bad. It was probably so held in *Somerville v. Lethbridge*,¹ though the case is too imperfectly reported for any certain conclusion.² And such a limitation in the case of *Beard v. Westcott*, after having been held good by the Court of Common Pleas,³

¹ 6 T. R. 213.

² In 6 T. R. 213, the devise by the testator is said to have been in trust for the use of A. "for the term of ninety-nine years if he should so long live, and after that term to the use of the first, second, third, and fourth sons of" A. "and the issue male of their bodies lawfully begotten for the like term of ninety-nine years, as they should be in seniority of birth, and in default of such issue male in him or them, then to the use of his kinsman" B. "and the issue male of his body lawfully begotten for the like term of ninety-nine years," and then over. The devise is stated in the same terms in *Southey v. Somerville*, 13 Ves. 486, 487; but the certificate of the judges says that the first son of A. would take an estate for ninety-nine years, determinable with his life. Sugden, in a note to his edition of *Gilbert on Uses*, 269, says that successive terms of ninety-nine years, determinable on their lives, were given to A. and to his first, second, third, and fourth sons, and the issue male of their bodies;

and in *Beard v. Westcott*, 5 Taunt. 393, 403, 404, where the interest of each successive taker was limited to an estate for ninety-nine years, determinable on his life, it was said by Serjeant Manley, in argument, that the devise "appears to have been penned by the same hand" as that in *Somerville v. Lethbridge*. It would seem, therefore, probable that all the issue were to take as purchasers, and that perhaps B. also was to have only an estate for ninety-nine years, determinable by his death. The Court of King's Bench certified to the Court of Chancery that A. took an estate for ninety-nine years determinable by his death, and then his first son an estate for ninety-nine years determinable by his death, and that the other limitations were void. If the devise to B. (a living person) was determinable by his death, it was good in itself, and was only rendered bad by its following limitations bad for remoteness.

³ 5 Taunt. 393. Qu., were there not here separable limitations?

was adjudged bad by the Court of King's Bench;¹ and the decision of the Court of King's Bench was approved by Lord St. Leonards, C., in *Monypenny v. Dering*,² and by Lord Romilly, M. R., in *Thatcher's Trusts*.³ *Burley v. Evelyn*,⁴ before Vice-Chancellor Shadwell, is to the same effect; and so appears to be *Palmer v. Holford*.⁵

§ 253. *Somerville v. Lethbridge* and *Beard v. Westcott* were cases from Chancery, and we have merely the certificates of the judges, without any reasons for their decision. All that is said in *Palmer v. Holford* on the point in question is given in the note to the preceding section. *Thatcher's Trusts* goes entirely upon *Beard v. Westcott*; and in *Burley v. Evelyn* the counsel conceded that a limitation subsequent to a remote limitation was invalid. The reasons and authorities, therefore, for the doctrine that a life interest given to a living person is bad if it follows an interest too remote are to be found in the argument of Sir Edward Sugden in *Beard v. Westcott*,⁶ and his judgment, when Chancellor, in *Monypenny v. Dering*.⁷ And with all respect for so distinguished a name, it must be said that his reasons are not satisfactory, and the authorities cited by him are not in point.

§ 254. In *Beard v. Westcott* ⁸ Sir Edward Sugden said, as

¹ 5 B. & Ald. 801.

² 2 De G. M. & G. 145.

³ 26 Beav. 365.

⁴ 16 Sim. 290.

⁵ 4 Russ. 403. In this case personal property was bequeathed in trust to accumulate the income for twenty-eight years, and then to pay the fund to the children of A. who were then living, and if no children of A. were then living, then to the children of B. who were then living, and if no children of B. were then living, then to B. if he was living; and in case of B.'s not being then living, there were other gifts over. The Master of the Rolls, Sir John

Leach, said that the gift to the children of A. was too remote, "and the gifts over, not being to take effect until after the same period, which is too remote, are necessarily void also." It does not appear whether it was necessary to pass upon this latter point or not. See *Re Abbott*, [1893] 1 Ch. 54, 57.

⁶ 5 B. & Ald. 801, 808.

⁷ 2 De G. M. & G. 145, 180 *et seq.* See Gilb. Uses (Sugd. ed.) 270, note, *et seq.*; 1 Jarm. Wills (5th ed.) 254, 255; Marsden, Perp. 291, 292.

⁸ 5 B. & Ald. 808.

counsel, that life interests to living persons were void "because it was the intention of the testator that those limitations should take effect only in case the previous limitations were capable of taking effect, and had failed;" and in *Mony-penny v. Dering*¹ he said that in *Beard v. Westcott* the Court of King's Bench "held that the gift over was void, not because it was not within the line of perpetuity, but expressly on the ground I have adverted to, namely, that that limitation over was never intended by the testator to take effect, unless the persons whom he intended to take under the previous limitation would, if they had been alive, been capable of enjoying the estate, and that he did not intend that the estate should wait for persons to take in a given event, where the person to take was actually in existence but could not take." But the imputation of such an intent to a testator seems unwarranted. Take the case suggested at the beginning of § 252, *ante*, — personalty bequeathed to A., and if A. dies without issue to B., and if B. dies without issue then to C. for life. Suppose the testator had been told: "Your bequest to B. is bad; but if, in fact, A. and B. both die before C. without issue, would you like C. to take? There is no legal objection to his doing so, should you wish it." What reason is there to suppose that the testator would have answered in the negative? If the precise contingency has happened on which he directed C. to take, why should it be supposed that he does not wish C. to take simply because another bequest cannot take effect? It is not as if C. would step into B.'s place, and take what the testator meant B. to have, for C. is to have nothing until B. has died without issue. The testator did not mean that the bequest to C. should take effect until the families of A. and B. had run out, and it is not suggested that it shall take effect until they have run out. But when they have run out, why should it not take effect? This supposed intention is not merely an arbitrary assumption, but one directly the opposite of the probable intention.

¹ 2 De G. M. & G. 182.

§ 255. The cases cited by Sir Edward Sugden in *Beard v. Westcott*¹ as authorities in support of his position are *Alexander v. Alexander*,² *Robinson v. Hardcastle*,³ *Routledge v. Dorril*,⁴ *Brudenell v. Elwes*.⁵ They are cases where there had been an excess in the execution of powers. In *Alexander v. Alexander*, under a power to appoint to children, the fund was appointed to A., a daughter, for life, remainder to her children living at her death, but on default of such children of A. then to B., another daughter. A. died leaving children. It was held that although A.'s children were not objects of the power, yet that B. could not take; for the appointment was to him only on the contingency of A.'s dying without children, which had not occurred. In the other cases there were appointments to persons who were not objects of the power, and then contingent appointments over to persons who were within the power. The contingencies occurred, in fact, within the limits required by the Rule against Perpetuities; but as they might not have so occurred, the appointments made dependent on them (not being life interests) were of course too remote.⁶ These cases are no authority for *Beard v. Westcott* and the decisions which have followed it. In these cases of powers, the reason why a future interest could not take effect was either that the contingency upon which it depended had never occurred, or that the interest might come into possession at too remote a time. But in *Beard v. Westcott* the contingency upon which the gift over depended would have occurred, and the gift could not possibly have taken effect at too remote a time.

§ 256. If in these cases of powers there had been an appointment to persons not objects of the power, with an appointment over to persons who were objects of the power, and the event on which the gift over was to take effect had

¹ 5 B. & Ald. 808.

⁵ 1 East, 442.

² 2 Ves. Sr. 640, 643.

⁶ See *Reid v. Reid*, 25 Beav.

³ 2 Bro. C. C. 22, 344; 2 T. R. 241, 380, 781.

469; Sugd. Pow. (8th ed.) 508-511; Marsden, Perp. 258, 289.

2 Ves. Jr. 357.

been one which must have occurred, if at all, within the limits of the Rule against Perpetuities, and which in fact had occurred, then those cases would have been in point in *Beard v. Westcott*. Such a case has occurred, and was decided by Sir Edward Sugden himself in favor of the validity of the limitation over. In *Crozier v. Crozier*¹ a donee of a power to appoint among his children appointed to his wife for life, remainder to his eldest son. The Lord Chancellor of Ireland held that during the life of the wife the property went as in default of appointment, but that the appointment to the eldest son in fee was good. In commenting on *Beard v. Westcott* he said he thought the decision of the Court of Common Pleas was wrong, "for the consequence was that there might be a person *in esse* entitled to take according to the words of the first limitation in the will, but incapable in law, and a remainder-man *in esse* capable of taking by law, but incapable of taking under the will because the contingency has not happened, which was to determine the preceding estate."² It is true these were the consequences in *Beard v. Westcott*, but they were also the precise consequences of the decision in *Crozier v. Crozier*. There was the wife, "a person *in esse* entitled to take according to the words of the first limitation but incapable in law;" and there was also the eldest son, "a remainder-man *in esse* capable of taking by law but incapable of taking under the will, because the contingency had not happened which was to determine the preceding estate," i. e. the death of the wife. These consequences were not deemed objectionable in *Crozier v. Crozier*: why should they have been in *Beard v. Westcott*?³

§ 257. The doctrine that a vested limitation or a limitation for life to a living person is void if it follows an interest which is too remote, cannot be traced clearly beyond *Beard v. Westcott*, in which the Courts of Common Pleas and of King's Bench came to

¹ 3 Dr. & W. 353.

² P. 369.

³ In *Armstrong v. West*, 8 Ir. Jur. n. s. 144, the limitation over

might have taken effect at too remote a period. As to *Willson v. Cobley*, [1870] W. N. 46, see 48 L. T. 388.

opposite conclusions. As it introduces an arbitrary element into the Rule against Perpetuities, and defeats the intentions of testators without any pretext of public policy, under the false pretence of supporting them, it is submitted that it ought not to be followed in America.¹

§ 258. As the existence of a power does not affect the vesting of a limitation in default of appointment,² a power under which only appointments that may be too remote can be made, will not invalidate limitations in default of appointment.³ And if under a good power no appointment or a good appointment is made, the fact that a bad appointment might have been made will not render the gift in default of appointment bad.⁴

12. *Conflict of Laws.*

§ 258 *a.* When from statutory changes⁵ or otherwise, there is a different law on the subject of remoteness in one jurisdiction from that which prevails in another, questions may arise under the Conflict of Laws.

§ 259. *Real Estate.* When the title to land situated in a certain jurisdiction is transferred, either *inter vivos* or by will, whether the transfer be direct or in trust, and whatever be the domicil of the grantor, testator, grantee, devisee, trustee, or *cestui que trust*, the transfer cannot be on limitations or trusts which the law of that jurisdiction considers too remote, but can be on limitations or trusts which such law does not consider too remote, whatever be the law of any other juris-

¹ Mr. Lewis, *Perp.* 421, 661, states distinctly the doctrine here maintained as law. Singularly enough, however, he notices in this connection the decision of *Beard v. Westcott*, only in the Court of Common Pleas, 5 Taunt. 393, and not in the Court of King's Bench, 5 B. & Ald. 801. See 1 Tiffany, *Real Prop.* § 157; 1 Jarm. *Wills* (6th ed.) 352, 354.

² See § 112, *ante*.

³ *Wollaston v. King*, L. R. 8 Eq. 165. *Re Abbott*, [1893] 1 Ch. 54. See *In re Hobson's Will*, [1907] Vict. L. R. 724, 736, 737; § 535, *post*.

⁴ *In re Bowles* [1905] 1 Ch. 371. *In re Davies & Kent's Contract*, [1910] 2 Ch. 35.

⁵ As to which, see Appendices B and C, §§ 686-773, *post*.

diction.¹ And as the true rule is that immovables are governed by the *lex rei sitæ*, whether they are technically real estate or not, the remoteness of a conveyance or devise of a term for years is to be determined by the law of the place where the land lies.²

§ 259 *a*. In *Ellis v. Maxwell*³ an English testator directed the rents of his Irish estates to be accumulated and "become a part of his personal estate." The direction for accumulation was in violation of the Thellusson Act.⁴ It was held that the rents of the estates could be accumulated as directed, the Act not applying to Ireland, but that the income of the accumulated rents could not.

§ 260. *Personal Property*. Direct future limitations of personalty by deed are not allowed in England or in North Carolina,⁵ but future limitations of personalty can be everywhere created by deed through the means of a trust.

§ 260 *a*. Questions arising under the Conflict of Laws concerning conveyances of personalty *inter vivos* present great theoretical difficulties. For whereas, in bequests, the law of the testator's domicile is undoubtedly that to which reference must in the first place be made,⁶ it is very doubtful what is

¹ *White v. Howard*, 52 Barb. 294; 46 N. Y. 144. *Knox v. Jones*, 47 N. Y. 389. *Brewer v. Brewer*, 11 Hun, 147; *sub nom.* *Brewer v. Peniman*, 72 N. Y. 603. *Draper v. Harvard College*, 57 How. Pr. 269. *Hobson v. Hale*, 95 N. Y. 588. *Lee v. Tower*, 124 N. Y. 370. *Butler v. Green*, 65 Hun, 99. *Trowbridge v. Metcalf*, 5 N. Y. Ap. D. 318; *sub nom.* *Trowbridge v. Trowbridge*, 158 N. Y. 682. *Ford v. Ford*, 70 Wis. 19; 72 Wis. 621. *Penfield v. Tower*, 1 N. Dak. 216. See *Fellows v. Miner*, 119 Mass. 541; *Wheeler v. Fellowes*, 52 Conn. 238; *Clarke's Ap.*, 70 Conn. 195; *Chaplin, Suspension of Alienation*, §§ 517-522. Cf. *Mount v. Tuttle*, 183 N. Y. 358, 364.

² So held by Lord Selborne, C., in *Freke v. Carbery*, L. R. 16 Eq. 461. See *Duncan v. Lawson*, 41 Ch. D. 394; *Goods of Gentili, Ir. R.* 9 Eq. 541; *De Fogassieras v. Duport*, 11 L. R. Ir. 123; *Dicey, Confl. of L.* 73. The contrary was decided in *Despard v. Churchill*, 53 N. Y. 192, but the English and Irish decisions seem preferable. Cf. *Chatfield v. Berchtoldt*, L. R. 7 Ch. 192; *Macpherson v. Stewart*, 28 L. J. Ch. 177; 32 L. T. R. 143.

³ 12 Beav. 104.

⁴ 39 & 40 Geo. III. c. 98.

⁵ §§ 78, 92, *ante*.

⁶ Cf. *Hewitt v. Green*, 77 N. J. Eq. 345, 362, 366.

the proper law to apply in cases of transfers *inter vivos*.¹ There are only two cases of a transfer *inter vivos* where a question as to the Conflict of Laws on remoteness has actually arisen.

§ 261. The first is *Heywood v. Heywood*.² Here upon the marriage in Ireland of a domiciled Englishman to the daughter of a domiciled Irishman, in accordance with the terms of the marriage settlement, which was drawn and executed in Ireland, £3,000, Irish currency, were paid to the trustees of the settlement by the bride's father, to accumulate during the lives of the husband and wife. The Thellusson Act³ provides that accumulation under a settlement shall not continue longer than the life of the settlor. The Act does not extend to Ireland. The Master of the Rolls held that the accumulation was good at least during the life of the husband. He said that if the husband was to be regarded as the settlor, accumulation during his life was lawful under the Thellusson Act, and that if the settlement was by the bride's father, it "must be considered as an Irish settlement by a domiciled Irishman," in which case it was not subject to the Thellusson Act. Regarding the bride's father as settlor, the settlor was an Irishman, the marriage took place in Ireland, the settlement was drawn and executed in Ireland, and the money was paid to the trustees in Ireland. It does not seem clear to which of these circumstances it is due that the case was considered as governed by Irish law. Generally a marriage settlement is governed by the law of the matrimonial domicile.⁴

§ 262. The other case is *Fowler's Appeal*.⁵ Here a resident of Chicago by deed executed in Chicago gave certain Western railroad bonds to a Philadelphia Trust Company in trust for a resident of Colorado and her issue. The trust deed contained provisions for accumulation which were invalid by the laws of Pennsylvania, but not (it was assumed) by the

¹ Dicey, Conf. of L., Rules 140-142, pp. 530-537. Cf. *Robb v. Washington & Jefferson College*, 103 N. Y. Ap. D. 327; 185 N. Y. 485.

² 29 Beav. 9.

³ 39 & 40 Geo. III. c. 98.

⁴ Dicey, Conf. of L. 653.

⁵ 125 Pa. 388.

law of Illinois or of Colorado. It was held by the Supreme Court of Pennsylvania that the provisions for accumulation were valid.¹

§ 263. Coming, then, to wills: If a bequest in the will of A. who has died domiciled in State X., is given to B. who is resident in State Y., the limitations or trusts upon which the legacy is given may be too remote either by the law of X. or by the law of Y.; if they are too remote by the laws of both States, or of neither, *cadit quæstio*.

§ 263 a. Suppose then, *first*, that a legacy is made on limitations or trusts which are valid by the law of the testator's domicil, but are too remote by the law of the residence of the legatee or *cestui que trust*. If the legacy is direct, it will be valid; the residence of the legatee is immaterial. So if the legacy is in trust it will be good; the residence of either the trustee or the *cestui que trust* is immaterial.² A change of residence by the trustee or *cestui que trust* cannot affect the validity of the trust.³

§ 263 b. Suppose, *secondly*, that a legacy is given on limitations or trusts which are too remote by the law of the testator's domicil, but not by the law of the residence of the legatee. Here, according to the general rule that the law of the testator's domicil must govern, the limitations or trusts would seem to be invalid.⁴

¹ *Sed quære*. See § 725, *post*.

² *Cross v. U. S. Trust Co.*, 131 N. Y. 330. *Dammert v. Osborn*, 140 N. Y. 30, 46; 141 N. Y. 564. Cf. *Fellows v. Miner*, 119 Mass. 541; *Despard v. Churchill*, 53 N. Y. 192.

³ *Whitney v. Dodge*, 105 Cal. 192. See *De Renne's Estate*, 12 Weekly N. C. (Pa.) 94.

⁴ *Hussey v. Sargent*, 116 Ky. 53.

If a legacy is given on a charitable trust which is to be carried out in another jurisdiction, sometimes

the law of the domicil forbids such a legacy absolutely, in that case the legacy is void; but sometimes the law only forbids such trusts within the State of the domicil, and then the legacy is good. And in this latter case it seems that the trust will be subject to the law of the other jurisdiction, for instance, as to investment and management. *Manice v. Manice*, 43 N. Y. 303, 387. *Matter of Huss*, 126 N. Y. 537. *Hope v. Brewer*, 136 N. Y. 126. *St. John v. Andrews Inst.*, 117 N. Y. Ap. D. 698; 191 N. Y. 254. *Ken-*

§ 264. *Conversion*. When a testator directs land to be sold, or personalty to be invested in land, the laws of the domicile and of the *situs* of the land may differ. Suppose land is settled or devised on limitations or trusts which are too remote according to the *lex rei sitæ*, but the devise is accompanied with a direction that the land shall be sold and the proceeds held as personalty or invested in land in a State where such limitations or trusts are allowed, is such settlement or devise valid? In the case of *Freke v. Carbery*,¹ Lord Selborne, C., held that it was not.²

nedy v. Palmer, 1 T. & C. 581. *Mapes v. Home Miss. Soc.*, 33 Hun. 360. *Draper v. Harvard College*, 57 How. Pr. 269. *Vausant v. Roberts*, 3 Md. 119. Whether this extends to questions of remoteness does not seem to have been directly decided. Such questions are conceivable, but are not likely to occur. See *Fordyce v. Bridges*, 2 Phil. 497, 515, § 266 *a*, *post*.

If the law of the other jurisdiction forbids such charitable trusts, the legacy is void. *Catt v. Catt*, 118 N. Y. Ap. D. 742. But if such trusts would be allowed by the law of the domicile, its courts will strive to give effect to it by *cy pres* or otherwise; see *Fellows v. Miner*, 119 Mass. 541, 546.

¹ L. R. 16 Eq. 461.

² And the same seems to have been held in *Parkhurst v. Roy*, 27 Grant, 361; 7 Ont. Ap. 614. Cf. *Anderson v. Kilborn*, 13 Grant, 219. In *Macpherson v. Stewart*, 28 L. J. Ch. 177, 32 L. T. R. 143, an English testator gave his property to trustees, directing them to place it in such funds, stocks, or securities, either in Europe or India, as they might deem advisable, in trust to make certain payments to

certain persons, and on their death to apply the fund, with all accumulations, in the purchase of land in Scotland, to be strictly entailed on A. The Thellusson Act (39 & 40 Geo. III. c. 98), § 3, provided that nothing in the Act contained should extend "to any disposition respecting heritable property within that part of Great Britain called Scotland." Vice-Chancellor Kindersley held (1) that during the lives named the Thellusson Act applied to the accumulations of income; and (2) that during this period the income of so much of the fund as was invested in Scotch heritable bonds formed no exception. The first holding was certainly correct. The second holding would seem correct also; for, *First*. The provisions for investment during the life interests hardly amounted to a direction to convert. *Second*. If *Freke v. Carbery* is correct, a trust as to converted property is not good, unless it would be good as to the property unconverted. *Third*. If *Freke v. Carbery* is not correct, heritable bonds, though considered heritable property in Scotland, Bell's Principles, § 1485, are yet in their nature movables, and it

§ 265. The view now generally adopted in America is that the decision of the question must depend upon whether there is an immediate absolute equitable conversion. If the deed or will directs such immediate absolute conversion, then the settlement or devise is valid, but if there is no such direction for immediate absolute conversion, the devise or settlement is invalid.¹

§ 266. The American doctrine seems preferable to that of Lord Selborne, C. In *Freke v. Carbery*, as reported, almost the whole attention of court and counsel was directed to the question whether leaseholds were governed by the *lex rei sitæ*. The only authority cited to support the ruling as to conversion was *Curtis v. Hutton*.² In this case land in England was devised to be sold, and the proceeds were directed to be applied for the maintenance of a charity in Scotland. Sir William Grant, M. R., held the devise bad. He said: "The disinheriting of the lawful heirs by languishing or dying persons, which is treated by the Statute as a mischief, cannot be less so, where the effect is to carry the property out of England." But the holding of real or personal estate in foreign jurisdictions on remote limitations, is not within the mischief of the Rule of Perpetuities of a State, which is only concerned with property within that State.³

should seem, out of Scotland, ought to be considered, for the purpose of applying the Rule against Perpetuities, as movables; just as leaseholds, though personal property, are considered for such purpose as immovables. See § 259, *ante*.

¹ Clarke's App., 70 Conn. 195. *Draper v. Harvard College*, 57 How. Pr. 269. *Hobson v. Hale*, 95 N. Y. 588. *Butler v. Green*, 65 Hun, 99. *Trowbridge v. Metcalf*, 5 N. Y. Ap. D. 318; *sub nom.* *Trowbridge v. Trowbridge*, 158 N. Y. 682. *Hope v. Brewer*, 136 N. Y.

126. *Ford v. Ford*, 80 Mich. 42. *Ford v. Ford*, 70 Wis. 19; 72 Wis. 621. *Penfield v. Tower*, 1 N. Dak. 216. The case of *Wood v. Wood*, 5 Paige, 596, is probably not law. See *Chamberlain v. Chamberlain*, 43 N. Y. 424, 435; *Peabody v. Kent*, 153 N. Y. Ap. D. 286. See also App. I, § 916, *post*.

² 14 Ves. 537.

³ At the time of the first edition, the author was inclined to the contrary opinion. *Freke v. Carbery* is doubted in 1 Jarm. Wills (6th ed.) 3.

§ 266 *a*. In *Fordyce v. Bridges*¹ personal property was bequeathed to trustees to invest in either English or Scotch estates, the Scotch estates to be settled in strict Scotch entail. Lord Cottenham, C., held that investments could be made in Scotch estates. It was objected that the bequest of a fund to be invested in a regular Scotch entail was void as a perpetuity, but the Chancellor said: "The rules acted upon by the courts in this country with respect to testamentary dispositions tending to perpetuities relate to this country only."²

§ 267. When a testator domiciled in one State directs land situated in another State to be sold and the proceeds invested, either in personalty or in land, in the State of his domicil, on trusts which are illegal by the law of the latter State, though allowed by the *lex situs*, such trusts are void.³

¹ 2 Phil. 497, 515.

² It should be observed that "perpetuity" is here used in the sense of an unbarrable entail. See §§ 141 *a-f*, *ante*.

³ *Hawley v. James*, 7 Paige, 213. *Bible Soc. v. Pendleton*, 7 W. Va. 79. See *Ellis v. Maxwell*, 12 Beav. 104. In *White v. Howard*, 52 Barb. 294, 46 N. Y. 144, a Connecticut testator ordered his land in that State to be sold, and the proceeds invested in certain specified personal securities, or in real estate in New York, or any of the New England States, and to be held on trusts which were good in Connecticut but invalid by the law of New York. The trustees invested some of the property in New York lands. It was held that the trusts failed as to these lands so purchased. Certainly land in New York could not be held on trusts illegal by the law of that State. But it would seem to have been improper for the trustees to have invested the trust fund in property

which could not be held on the trust. See 46 N. Y. 166, 167.

In *Jenkins v. Guarantee Trust Co.*, 53 N. J. Eq. 194, a Pennsylvania testatrix gave the residue of her estate, real and personal, to a Pennsylvania trust company, in trust, among other things, to pay a legacy to a Pennsylvania charity. The legacy was in violation of the provisions of the Pennsylvania Mortmain Act. The testatrix left property in Pennsylvania, and also land in New Jersey. The Pennsylvania property was insufficient to pay the debts. The New Jersey Court of Errors and Appeals held that the legacy was void.

Suppose all the persons interested in such a provision as is given in the text should elect to take the realty unconverted, could they hold against the heirs?

On the doctrine of election as applicable to the questions discussed in the preceding sections, see *Staples v. Hawes*, 39 N. Y. Ap. D. 548.

CHAPTER VII.

INTERESTS, THOUGH ALIENABLE, MAY BE TOO REMOTE.

§ 268. As has been said,¹ the tying up of property was attempted in two ways, first, by making vested estates inalienable, and when the judges stopped this, then by the creation of indestructible future contingent estates; and, to restrain these last, the Rule against Perpetuities was devised. The tying up of property is therefore restrained, as to present estates, by making them alienable, and, as to future estates, by subjecting them to the Rule against Perpetuities. Since the original purpose of the Rule against Perpetuities was to restrain one mode of tying up estates, it would not have been inconsistent with that purpose to have held that contingent interests, if alienable, did not come within the Rule, but, as will appear in this chapter, the Rule has been extended so as to cover all future interests whether alienable or not, and this extension, though not a logically necessary consequence of the establishment of the rule, is now well settled, and it is a reasonable extension. If there is a gift over of an estate on a remote contingency, the market value of the interest of the present owner will be greatly reduced, while the executory gift will sell for very little, or, in other words, the value of the present interest *plus* the value of the executory gift will fall far short of what would be the value of the property if there were no executory interest. Further, if the owner of the present interest wishes to convey an absolute fee, the holder of the executory gift can extort from him a price which greatly exceeds what it ought to be, if based on the chance of

¹ § 140 *et seq.*, *ante*.

his succeeding to the property.¹ And again, just as it has been for centuries the policy of our law to allow a man full power of disposition of his property, under the belief that thereby the activity of the owner will be increased and the public benefited, so it is against public policy to allow such activity to be diminished by the fear of losing the property on a future contingency; and while near future interests may be desirable modifications of ownership, remotely contingent interests are likely to diminish the activity in ownership to an extent greater than any advantages which will follow from allowing them. To put it in other words, it is desirable that a man's motives to make the most of his property should not be diminished by the danger of losing it on a future contingency; on the other hand each generation should have the power of providing for those who come immediately after it in the way it thinks best by limiting the interests given them; and the Rule against Perpetuities, as extended, is the line which the law has laid down so as to give both these desirable objects a reasonable field without encroaching on the other.

§ 269. It has been sometimes, and indeed often, said that if future interests can be alienated or released, they cannot be too remote, and that the Rule against Perpetuities is aimed only at such limitations as tie up property, and take it absolutely out of commerce. Every executory devise was said, by Powell, J., in *Scatterwood v. Edge*,² to be "a perpetuity as far as it goes, that is to say, an estate unalienable, though all mankind join in the conveyance;" and this definition of a perpetuity has been frequently cited in the cases, and has been laid hold of in support of the view that conditions are free from the restraints of the Rule.³ But without going here

¹ See 1 Tiffany, Real Prop. § 152.

² 1 Salk. 229.

³ See also *Keppell v. Bailey*, 2 Myl. & K. 517, 527, 528 (cf. Challis, Real Prop. (3d ed.) 184); *Gooch v. Gooch*, 3 De G. M. & G. 366, 384;

Brattle Square Church v. Grant, 3 Gray, 142, 148, "in which a single ambiguous or inaccurate expression has sometimes led to a misunderstanding of the law intended to be stated." *Winsor v. Mills*, 157 Mass. 362, 365; 8 Jur. pt. 2, 284, note.

into disputed questions, it is clear that the Rule applies to cases where there is no tying up of property. For instance, suppose real and personal property are given to trustees and their heirs, with full power of changing investments, but upon trusts which may arise more than twenty-one years after lives in being, such trusts are void, yet no property is tied up.¹ But, further, conditional limitations may be bad for remoteness, though they are releasable or alienable.² It is true that a conditional limitation to an uncertain person cannot be released because there is no one to release it; but when a conditional limitation is to a known person and his heirs, and the contingency is only in the happening of the event on which the conditional limitation is to take effect, it may be released (or, if equitable, either released or assigned); yet if such event may occur more than twenty-one years after lives in being, the conditional limitation is too remote. Thus a bequest of personalty is too remote if to take effect after the failure of issue of A., either to a living person³ or to a corporation.⁴ So a conditional limitation of real estate may be too remote, although made to a living person in fee.⁵ In like manner, if the persons to whom a gift is made may not be ascertained within the required limits, the gift is too remote, although the class to which they belong must be determined within those limits, and a conveyance by the whole class would pass the entire interest.⁶ It may

¹ 4 Kent, Com. (12th ed.) 283. *Wheeler v. Fellowes*, 52 Conn. 238, 244.

² "The possibility or impossibility of obtaining releases is not the test by which to determine the validity or invalidity of a limitation." *Winsor v. Mills*, 157 Mass. 362, 366.

³ *Grey v. Montagu*, 2 Eden, 205; 3 B. P. C. (Toml. ed.) 314.

⁴ *Johnson's Trusts*, L. R. 2 Eq. 716.

⁵ *Brown & Sibly's Contract*, 3

Ch. D. 156. *Brattle Square Church v. Grant*, 3 Gray, 142. *Society for Theological Education v. A. G.*, 135 Mass. 285. *Winsor v. Mills*, 157 Mass. 362.

⁶ See cases cited in § 277, *post*. See also *Marsden, Perp. c. 3*; *Sanders on Uses* (5th ed.), 203, 204; *London & S. W. R. Co. v. Gomm*, 20 Ch. D. 562, 573-575 (explaining *Washborn v. Downs*, 1 Ch. Cas. 213); *Curtis v. Lukin*, 5 Beav. 147; § 675, *post*.

be said that although an executory devise can be released, it cannot be assigned to a stranger. But it can be released to the owner of the present estate, and he can convey a fee, — that is, the two, by joining, can convey an absolute estate, — and therefore the case does not come within Powell's definition. Besides, an equitable executory interest can be assigned to a stranger, yet the Rule applies equally to such interests as to legal estates.¹ Again, modern statutes have very generally made legal executory interests alienable as well as releasable;² but this has made no change in the Rule against Perpetuities.³

§ 270. There were, however, three decisions which seemed opposed to this: *Gilbertson v. Richards*,⁴ *Birmingham Canal Co. v. Cartwright*,⁵ and *Avern v. Lloyd*.⁶

§ 271. In *Gilbertson v. Richards*⁷ there was a mortgage to H. to secure the payment of £5,000, the equity of redeeming which was in B. The mortgage deed, made in 1838, declared that if there was any default in payment of the £5,000, H. might sell and dispose of the land, and contained a proviso that if the mortgagee or any persons claiming by, through, or under him should, by virtue of any power therein contained, enter upon or otherwise become possessed of the land, the land should immediately become charged with a rent of £40 in favor of B. There was a default, and in 1847 H. sold the land. B. contended that thereupon the rent arose; the purchaser contended that the provision for its creation was void for remoteness. The Court of Exchequer held that the rent was duly created. They said: "It seems to be an error to call this rent a perpetuity, in an illegal sense. It is vested in Thomas Billings and his heirs. He or his heirs may sell it, or release it, at their pleasure. A rent in fee simple may be

¹ See *Gray v. Montagu and Johnson's Trusts*, *ubi supra*, and the cases cited in § 277, *post*.

² For instance, 8 & 9 Vict. c. 106, § 6.

³ *Lewis*, Suppl. 13-20. *Marsden*, Perp. 66.

⁴ 4 H. & N. 277; 5 H. & N. 453.

⁵ 11 Ch. D. 421.

⁶ L. R. 5 Eq. 383.

⁷ 4 H. & N. 277.

granted to a man and heirs to continue forever. Why, therefore, may not one be granted to commerce at any time however remote? It is only a part of the estate in fee simple of the rent. A perpetuity arises when a rent is granted to a person who may not be *in esse* until after the line of perpetuity be passed; but when the estate in the rent is vested in an existing person and his heirs in fee simple, who may deal with it at his or their pleasure, and as he or they think fit, we think it is not subject to the objection of remoteness, notwithstanding that its actual enjoyment may depend upon a contingency which may never happen, or may happen at any time however distant.”¹

§ 272. But the Court of Exchequer Chamber, to which the case was carried,² rested the decision, not on the fact that the mortgagors could release their right to the rent charge, but on the ground that the case was analogous to that of a power of sale in a mortgage. They said: “The real effect of the limitations in the deed before us is, that the mortgagees are to take possession or sell, subject to the payment of this rent to Billings. It is a restriction on the amount of the estate of the mortgagees, and seems within the cases as to the power of sale in a mortgagee, which, as incidental to his estate, is held not to be within the Rule as to Perpetuities.”³ So Lord St. Leonards,⁴ after saying that the distinction taken by the Court of Exchequer was not necessary for the decision of the case, adds: “No perpetuity was created by the power of sale in the mortgagees, or by the right of them or their heirs to take possession of the land, but in exercising that right they took, subject to a perpetual rent of £40 a year, in favor of the mortgagor. It was a charge on the estate and had no tendency to a perpetuity.”⁵

§ 273. The Court of Exchequer Chamber, however, did not distinctly repudiate the doctrine of the Exchequer. They said:

¹ 4 H. & N. 297, 298.

² 5 H. & N. 453.

³ 5 H. & N. 459.

⁴ Sugd. Pow. (8th ed.) 16.

⁵ And see Williams on Settlements, 31, 32; Marsden, Perp. 248; Chap. XVI., *post*, on Mortgages.

"There may be considerable doubt also on the point raised by counsel, whether the Rule as to Perpetuities applies to a case like the present, where the party who or whose heirs are to take is ascertained, and who can dispose of, release, or alienate the estate, either at common law or at all events since the passing of 8 & 9 Vict. c. 106, § 6." ¹

§ 273 *a*. Perhaps *Gilbertson v. Richards* may be supported on the ground that the future right to the £40 annually was not a right of property, but simply a contract obligation. A contract right, as such, is certainly not subject to the Rule against Perpetuities.² A rent charge is a right to a sum of money which can be enforced by distraint on certain land. The right to distraint is simply a remedy, and perhaps fairly enough to be considered not a right in property, and therefore not within the purview of the Rule against Perpetuities. In *Morgan v. Davey*³ a lessee covenanted for himself, his heirs and assigns, to pay certain sums "by way of rent charge or royalty or reservation" if he should mine coal. Mathew, J., at *nisi prius*, ruled, on the authority of *Gilbertson v. Richards*, that this covenant was not within the Rule against Perpetuities. Except so far as it created a rent charge, it certainly was not subject to the Rule. Even viewed as creating a rent charge, it may be sustained on the ground, above suggested, that it gave merely a remedy and not a right of property.⁴

§ 274. The case of *Birmingham Canal Co. v. Cartwright*⁵ was a clear decision that an executory interest which could be released was not within the Rule against Perpetuities. The

¹ 5 H. & N. 459. The section of the statute referred to provides that executory and contingent interests in realty may be disposed of by deed.

² § 329, *post*.

³ 1 Cab. & El. 114.

⁴ Rents charge have generally been dealt with in the common law together with property, and not simply as obligations. But the

Rule against Perpetuities deals with the substance of things. Does the right to distraint on land in order to enforce a right *in personam* make that right a right *in rem*? A question not easy to answer. The distinction between substantive rights and remedies is sometimes hard to draw. See § 303, *post*.

⁵ 11 Ch. D. 421.

vendor of lands, reserving the mines, covenanted with the vendee that should he ever sell the mines under adjoining land, he would sell the reserved mines to the vendee at the same rate as that at which he should have sold the adjoining mines. Fry, J., held that the covenant was not obnoxious to the Rule against Perpetuities, and that specific performance could be enforced by the assigns of the vendee against the devisees of the vendor. The learned judge said: "I think that wherever a right or interest is presently vested in A. and his heirs, although the right may not arise until the happening of some contingency which may not take effect within the period defined by the Rule against Perpetuities, such right or interest is not obnoxious to that Rule, and for this reason. The Rule is aimed at preventing the suspension of the power of dealing with property, — the alienation of land or other property. But when there is a present right of that sort, although its exercise may be dependent upon a future contingency, and the right is vested in an ascertained person or persons, that person or persons, concurring with the person who is subject to the right, can make a perfectly good title to the property. The total interest in the land, so to speak, is divided between the covenantor and the covenantee, and they can together at any time alienate the land absolutely. I think that *Gilbertson v. Richards* is a distinct authority in favor of that conclusion." ¹

§ 275. But *Birmingham Canal Co. v. Cartwright* has been overruled, and the true doctrine clearly stated by the Court of Appeal in *London & S. W. R. Co. v. Gomm*.² In that case

¹ 11 Ch. D. 432, 433. In *Collison v. Lettsom*, 6 Taunt. 224, there came in question a covenant in a lease for a term of twenty-eight years, by which the lessor covenanted that if he, his heirs or assigns, should, during the term, have an advantageous offer to dispose of certain adjoining land, the

lessee, his executors, administrators, or assigns, should have a right of pre-emption. The Court held that there had, in fact, been no breach of the covenant. Whether the covenant was too remote or not was not mooted.

² 20 Ch. D. 562.

the plaintiff company in 1865 conveyed land to Powell in fee, and Powell covenanted with the company that he, his heirs or assigns, would, at any time, on receipt of £100, reconvey the land to the company. In 1879 Gomm purchased the land from Powell with notice of the covenant, and in 1880 the company demanded a conveyance, and, upon Gomm's refusal, brought a bill for specific performance. Kay, J., discussed the cases very fully, and declared that he was unable to agree with what had been said in *Gilbertson v. Richards* and *Birmingham Canal Co. v. Cartwright*. "In my opinion," he said, "a present right to an interest in property which may arise at a period beyond the legal limit is void, notwithstanding that the person entitled to it may release it."¹ The learned judge, however, thought that the Rule against Perpetuities was "a branch not of the law of contract but of property." "A contract not creating any estate or interest properly so called in property, at law or equity, is not, in my opinion obnoxious to the Rule;"² and as the covenant in this case did not run with the land at law, and a purchaser without notice would not be bound by it, he thought it was not within the Rule against Perpetuities at all, and made a decree for specific performance. Gomm appealed. The Court of Appeal (Jessel, M. R., Sir James Hannen, and Lindley, L. J. J.), reversed the decree. The Court held that the option to purchase gave an equitable interest which was within the Rule against Perpetuities, and that judged by that Rule it was void.³ The Master of the Rolls said⁴ he considered that Mr. Justice Kay

¹ 20 Ch. D. 573.

² 20 Ch. D. 575.

³ So *Trevelyan v. Trevelyan*, 53 L. T. R. 853; *Woodall v. Clifton*, [1905] 2 Ch. 257; *Worthing Corporation v. Heather*, [1906] 2 Ch. 532; *Kauri Timber Co. v. District Land Registrar*, 21 N. Z. L. R. 84. See *Mackenzie v. Childers*, 43 Ch. D. 265, 279; *Savill Brothers v. Bethell*, [1902] 2 Ch. (C. A.) 523; *Edwards v.*

Edwards, [1909] A. C. 275; *Hardy v. Galloway*, 111 N. C. 519; *Starcher Brothers v. Duty*, 61 W. Va. 373; *Redington v. Browne*, 32 L. R. Ir. 347, 358, 359; *Switzer v. Rochford*, [1906] 1 I. R. 399; *In re Tyrrell's Estate*, [1907] 1 I. R. 194, 292; *In re Doyle's Estate*, [1907] 1 I. R. 204; *Hasker v. Summers*, 10 Vict. L. R. Eq. 204, 210.

⁴ 20 Ch. D. 582.

was "quite right in the view he takes of the doctrine of remoteness and of the authorities cited before him, not forgetting the case of the *Birmingham Canal Co. v. Cartwright*, which must be treated as overruled," and that he had "most correctly and accurately defined the law," but that he was in error in thinking that the covenant did not create any interest in land.¹

§ 275 *a*. *Winsor v. Mills*,² following the case of *London & S. W. R. Co. v. Gomm*, held that an option in M., his heirs and assigns to purchase land was too remote; and previous inaccurate *dicta* were corrected.³ To the same effect are *Starcher Brothers v. Duty*,⁴ and *Barton v. Thaw*.⁵

§ 276. The third case which favored the idea that an alienable interest cannot be too remote was *Avern v. Lloyd*.⁶ In that case there was a bequest of personal property to A. for life, and after A.'s death to his issue for life, and to the executors, administrators, and assigns of the survivor. Stuart, V. C., held, rightly it would seem, that it was intended to give the absolute interest to the survivor; but he went on to say: "Each of the tenants for life in this case had as much right to alien his contingent right to the absolute interest as to alien his life estate; and the person claiming under an assignment of the whole estate and interest of the tenant for life would, as soon as his assignor became the survivor of the other tenants for

¹ See *Kenrick v. Dempsey*, 5 Grant, 584; § 485, *post*.

An agreement for sale is not void because it does not limit the time within which the agreement is to be carried out; the vendee has an immediate equitable interest. *In re Doyle's Estate*, [1907] 1 Ir. 204.

On the question whether on a personal contract to convey an interest on property which is too remote a recovery can be had, see § 330 *et seq.*, *post*.

² 157 Mass. 362.

³ It is to be regretted that this case, while clearing the law concerning remoteness from prevalent misconceptions, contained *dicta* on the invalidity of provisions restraining a trustee from selling without the consent of the *cestuis que trust* which were of very questionable soundness. But this has now been set straight in *Howe v. Morse*, 174 Mass. 491. See §§ 509 *m*, 509 *n*, *post*.

⁴ 61 W. Va. 373.

⁵ 41 Pa. C. C. 396.

⁶ L. R. 5 Eq. 383.

life, be entitled to the possession and enjoyment as absolute owner. It seems obvious that such a case is not within the principle on which the law against perpetuity rests, and that the limitation in question of the absolute interest does not fail as being too remote."

§ 277. But¹ in *Edmondson's Estate*,² the report of which, before Wood, V. C., immediately follows that of *Avern v. Lloyd*, it was conceded that limitations over to the survivors of a class who must all have been born within a life in being were too remote, although if the whole class had joined in a conveyance they could have made a good title. The Vice-Chancellor said that "of course" the gift over was void for remoteness. In *Hobbs v. Parsons*³ Stuart, V. C., himself had held that after a bequest to the testator's grandchildren a gift over, if any one of them died under twenty-two, to the survivors or survivor was void. Yet all the grandchildren could have made a good title. And also in *Courtier v. Oram*⁴ and *Garland v. Brown*⁵ limitations to survivors were held too remote, although the class to which the survivors belonged could have made a good conveyance, and must have been determined within a life in being. But further than this there are very many cases in which a gift to such of the children of a living person as reach some age greater than twenty-one have been held too remote.⁶ It is true that in such cases all the children could not convey a good title, because none of them might reach the prescribed age; but all the children, together with the heirs, next of kin, or residuary legatees of the testator, who would take should none of the children reach that age, could make a good title. All the modern English text-writers have condemned *Avern v. Lloyd*,⁷ and it has

¹ As pointed out in Williams, Settlements, 33.

² L. R. 5 Eq. 389.

³ 2 Sm. & G. 212.

⁴ 21 Beav. 91.

⁵ 10 L. T. R. 292.

⁶ See §§ 372-374, *post*.

⁷ See Williams, Settlements, 32, 33; 1 Jarm. Wills (6th ed.) 305, 350; Theob. Wills (7th ed.) 603, 604; Marsden, Perp. 178; 45 L. T. R. 339. See also *Curtis v. Lukin*, 5 Beav. 147. Cf. *Stuart v. Cockerell* L. R. 7 Eq. 363, 368, 369.

now been expressly overruled by the Court of Appeal in *Re Hargreaves*.¹

§ 278. A remark seems here in place. There are two propositions which are often confounded, but which are, in truth, distinct.

First. Future contingent interests, if alienable, are not subject to the Rule against Perpetuities.

Second. The Rule against Perpetuities is directed at preventing a suspension of alienation of present interests.

Both propositions are erroneous, — but in a very different degree.

To subject future contingent interest presently alienable to the Rule against Perpetuities is an extension of the Rule beyond the needs which gave it birth. The extension is well settled and reasonable, as is shown in this Chapter, but it is not necessary.

But to suppose that the Rule against Perpetuities is needed to restrain a suspension of alienation, or that present interests in property might be made inalienable were it not for the Rule, is to throw the fundamentals of the law into confusion.

§ 278 *a.* The fullest and ablest presentation of the view that future contingent interests, if alienable, ought not to be subject to the Rule against Perpetuities, is to be found in Professor Reeves's *Treatise on Special Subjects of the Law of Real Property*, Boston, 1904.² Professor Reeves argues that there is no sufficient justification for the extension of the Rule to cover alienable contingent future interests; and that, as an original question, such interests should not be subject to the Rule. He contends that the provisions of the New York Revised Statutes touching these matters, which are based on the conception of "suspension of alienation," are more consonant with what was

¹ 43 Ch. D. 401, followed in *In re Ashforth*, [1905] 1 Ch. 535, 541, where Farwell, J., says: "Three void contingent remainders will not make one good vested remainder." In *Stevens v. Annex Realty Co.*, 173 Mo. 511, there was

no future estate. The opinion shows the confusion of ideas referred to in the following section.

² And now cf. an article by Mr. Charles Sweet, 18 *Jurid. Rev.* 132, 138, 139.

the original object and with what should be the true extent of the Rule.

§ 278 *b*. The difficulty lies here. If by "suspension of alienation" is meant suspension of alienation through future interests, — and this is the meaning, it would seem, which Professor Reeves attaches to it, — then, according to his view, as well as according to the common view, the Rule against Perpetuities is aimed at the control of future estates, and should appropriately be called the Rule against Remoteness. The only difference between the two views is that by one, future interests alienable *in præsenti* are considered too remote; and by the other, they are not.

§ 278 *c*. An interest void for remoteness is an interest whose invalidity arises from its being a future and not a present interest. Not all future interests are remote. Thus everyone agrees that an interest presently vested is not remote; that an interest vesting within twenty-one years after lives in being is not remote; that an interest destructible by the owner of the present interest is not remote. If Professor Reeves's view were correct, it would only mean that we should have to add that an interest alienable or releasable presently or within twenty-one years after lives in being is not remote. The conception of the Rule against Perpetuities as applying solely to future and never to present interests would not be changed.

§ 278 *d*. But the phrase "suspension of alienation" and still more "restraint of alienation" includes the suspension or restraint of alienation of present interests by direct provisions, and, therefore, when it is said that the Rule against Perpetuities is aimed at the suspension or restraint of alienation, it is natural to suppose that the Rule has something to do with provisions directly suspending or restraining the alienation of present interests, an idea which, as has been said, has thrown the fundamentals of the law into confusion. To see how great that confusion may be one has only to read the Maryland decisions stated § 245 *c*–245 *k*, *ante*, or the decisions made under statutes based on restraining "suspension of alienation."

CHAPTER VIII.

INTERESTS SUBJECT TO THE RULE AGAINST PERPETUITIES.¹

§ 279. *Easements, profits a prendre, and other rights over the lands of others* are not future but present interests, and the Rule against Perpetuities has no application to them.² This statement would seem superfluous, were it not for the remark of Sir George Jessel, M. R.,³ that exceptions to the rules against remoteness had "been thoroughly established in many cases at law as regards easements."⁴ There is no need to create any exception; easements are present interests, and the Rule applies to future interests only.⁵ And further, as the Rule against Perpetuities affects the beginning only of future interests, and does not concern itself with conditions subsequent, except so far as they are also conditions precedent, a provision that an easement or other *jus in alieno solo* shall terminate on a certain contingency is not invalidated by the remoteness of the contingency.⁶ A remote con-

¹ The question whether the Rule against Perpetuities is good against the Crown is stated but not decided in *Cooper v. Stuart*, 14 Ap. Cas. 286, 293. See s. c. below, 7 N. S. Wales L. R. Eq. 1.

² Lewis, Perp. 599.

³ In *London & S. W. R. Co. v. Gomm*, 20 Ch. D. 562, 583.

⁴ See Marsden, Perp. 20; Challis, Real Prop. (3d ed.) 186, 187.

⁵ *Cawthon v. Stearns Culver Lumber Co.*, 60 Fla. 313; see *South Eastern R. Co. v. Associated Port-*

land Cement Manuf., [1910] 1 Ch. 12, §§ 330 a-330 c, *post*.

Easements, etc., created *in futuro* are subject to the Rule. These will be considered §§ 314-316, *post*.

"In *Switzer v. Rochford*, [1906] 1 I. R. 399, a legal rent charge for 500 years was granted on leasehold land with a proviso that it might be redeemed by payment of £300, and that it should then become void. It was held that the proviso was not void for remoteness. *Switzer v. Rochford* appears to have been doubted by the Irish

ditional limitation is invalid, not because the old estate ends at a remote period, but because the new estate begins at a remote period. The ceasing of one interest in possession of a corporeal hereditament is the beginning of another interest in possession, — it is a transfer of possession; but the termination of an easement is not the beginning of another easement, — the easement is not transferred; it is extinguished altogether.¹

§ 280. Covenants as to the use of land are often regarded in equity, according to the familiar doctrine of *Tulk v. Moxhay*,² and the numerous cases following it, as imposing a trust or burden on the land for the benefit of other land belonging to the grantor or to third persons. The rights thus created are sometimes called equitable easements; they are present interests, and are no more subject to the Rule against Perpetuities than are common-law easements. "There seems some difficulty in understanding the objection to such a modified enjoyment of property on the ground of its supposed tendency to a perpetuity."³

Court of Appeal in *In re Tyrrell's Estate*, [1907] 1 I. R. 292, 297, 303, but it seems to be correct (and see § 209, *ante*). The duty to give up the rent charge on payment of the £300 did not call for any transfer of a property right, but only for the extinction of the rent charge. See § 329, *post*. In *In re Tyrrell's Estate* a perpetual equitable charge on land was redeemable by the exercise of an option to pay the interest on a certain kind of bonds. The Court held that the equitable charge "could not be thus redeemed." This seems wrong. The Court rely on *London & S. W. R. Co. v. Gomm*, but there the option called for the transfer of a property right, while in *In re Tyrrell's Estate*

there was only an extinction of an equitable charge. But in *In re Donoughmore's Estate*, [1911] 1 I. R. 211, *Switzer v. Rochford* was not followed by *Wylie, J.*

¹ *Ardley v. Guardians of the Poor*, 39 L. J. Ch. 871 (fully stated, § 316, note, *post*). *Cleveland, etc. R. Co. v. Coburn*, 91 Ind. 557. *Hall v. Turner*, 110 N. C. 292. *Wiggins Ferry Co. v. Ohio & Miss. R. Co.*, 94 Ill. 83. *Brownlee v. Douslin*, N. Z. L. R. 2 S. C. 363; N. Z. L. R. 3 C. A. 57, 63; *ante*, § 17.

² 2 Phil. 774.

³ *Per* Sir J. L. Knight Bruce, *Ex parte Ralph, De Gex*, 219, 225. *Mackenzie v. Childers*, 43 Ch. D. 265, 279. *Hall v. Turner*, 110 N. C. 292. *Lewis, Perp.* 612. *Sugd. Vend. & P.* (14th ed.) 596. 2 Dav.

§ 281. A right given to the grantee of a legal or equitable easement to enter upon the servient tenement and abate any structure put up to the injury of such easement does not bring the easement within the scope of the Rule against Perpetuities. It does not affect the title to the land, but merely gives the grantee the right to do for himself what the law would do for him.¹

§ 282. It is immaterial how such equitable easement is created. According to the modern cases, when to a conveyance of land a condition restraining the mode of its use is attached, and such a condition is for the benefit of the land of other persons (and sometimes when it is for the benefit of land of the grantor himself), this condition is not regarded as a true condition, on breach of which the grantor or his heirs may enter and be in of their old estate, but is simply an inapt way of declaring a trust. To determine when words of condition constitute a true condition and when they create a trust is a question of construction outside the scope of this treatise.²

Prec. Conv. (4th ed.) 511, note. Marsden, Perp. 12, 13, 16. Challis, Real Prop. (3d ed.) 186, 187. 11 Enc. Laws of Eng. (2d ed.) 69. See *London & S. W. R. Co. v. Gomm*, 20 Ch. D. 562, 583; *Heald v. Ross*, 47 Atl. Rep. (N. J.) 575; *Wakefield v. Van Tassell*, 202 Ill. 41; *Stevens v. Annex Realty Co.*, 173 Mo. 511; *Noel v. Hill*, 158 Mo. Ap. 426. Cf. *Aspden v. Seddon*, 1 Ex. D. 496.

¹ *Tobey v. Moore*, 130 Mass. 448. In *Ex parte Ralph, De Gex*, 219, 228, 229, there was a contract to convey land subject to equitable easements, with proper provisions for their observance. The Court ordered a clause, giving a right to enter and abate any obstruction to the easements, to be inserted in the conveyance. The deed actually drawn limited this right to lives in

being and twenty-one years, but this seems to have been unnecessary. 2 Dav. Prec. Conv. (4th ed.) 511, note. Marsden, Perp. 62.

² In the time of Lord Coke, words of condition restraining the use of land, although manifestly imposed for the benefit of other land in the neighborhood, would undoubtedly have been deemed to create a condition enforceable by entry. In England, however, for nearly, if not quite, two centuries, the remedy by entry for breach of condition attached to a conveyance in fee simple has been practically obsolete. In mortgages all remedies have been had in equity, and if in devises clauses in the form of a condition have been inserted to secure the payment of legacies to the heir or third persons, the right to such legacies has not been en-

It is enough to say here that when they create a present equitable easement by way of trust, such equitable easement

forced by entry. The last instance in which an heir is reported to have entered for breach of a condition to pay a legacy to him is *Grimston v. Bruce*, 1 Salk. 156 (1707), (so said by counsel in *Wright v. Wilkin*, 2 B. & S. 232, 262), and in that case he was enjoined by the Court of Chancery. The only case found in either the eighteenth or the nineteenth century in England where the heir has entered for breach of a condition attached to a fee simple is *Doe d. Gill v. Pearson*, 6 East, 173 (1805), and there no trust could be raised, and the decision has been doubted. *Attwater v. Attwater*, 18 Beav. 330. *Billing v. Welch*, Ir. R. 6 C. L. 88. See Gray, *Restraints on Alienation* (2d ed.), § 31 *et seq.* The practice of entry undoubtedly fell into disuse, because when the condition was for the payment of money, which it generally was, equity would restrain a forfeiture, and would in many cases enforce the payment as a trust. Yet it was a bold statement for Sugden to make in his treatise on Powers (1st ed.) 96 (1808), "That what by the old law was deemed a devise *upon condition* would now, perhaps, in almost every case, be construed a devise in fee upon trust, and by this construction, instead of the heir taking advantage of the condition broken, the *cestui que trust* can compel an observance of the trust by a suit in equity." But this statement, which is repeated by the learned author in all the subsequent editions, — see 8th ed. p. 106

(1861), — though bold, was prophetic. In 1860 the Court of Queen's Bench, and on appeal the Exchequer Chamber, held, in the case of *Wright v. Wilkin*, 2 B. & S. 232, 259, that upon a devise on condition that the devisee should pay certain legacies, the heir could not enter for breach of condition, but that the devisee took the land on trust; and this view was adopted by the House of Lords in *A. G. v. Wax Chandlers' Co.*, L. R. 6 H. L. 1 (1873), overruling Lord Romilly, M. R., L. R. 8 Eq. 452; and Lord Hatherley, C., L. R. 5 Ch. 503. See also *A. G. v. Southmolton*, 14 Beav. 357; *Merchant Taylors' Co. v. A. G.*, L. R. 11 Eq. 35; *Re Richardson*, 56 L. J. Ch. 784. The same doctrine has been adopted in the Supreme Court of the United States, after elaborate argument, in *Stanley v. Colt*, 5 Wall. 119. So in Massachusetts. *Sohier v. Trinity Church*, 109 Mass. 1, 19. *Episcopal City Mission v. Appleton*, 117 Mass. 326. *Ayling v. Kramer*, 133 Mass. 12. *Skinner v. Shepard*, 130 Mass. 180. *Stone v. Houghton*, 139 Mass. 175. *Cassidy v. Mason*, 171 Mass. 507. These later decisions must be taken to have overruled anything to the contrary in the earlier Massachusetts cases of *A. G. v. Merrimack Manuf. Co.*, 14 Gray, 586, and *Guild v. Richards*, 16 Gray, 309. See also *Jeffries v. Jeffries*, 117 Mass. 184. In *Clapp v. Wilder*, 176 Mass. 332, it was held by four judges to three that a certain condition was not imposed for the benefit of land, but

is not within the Rule against Perpetuities; and that when they constitute a true condition, the effect of the Rule will be considered § 299 *et seq.*, *post*.

I. LEGAL INTERESTS.

A. REAL ESTATE.

§ 283. (1) *Reversions and vested remainders*, being vested interests, i. e. not subject to a condition precedent, are not within the scope of the Rule against Perpetuities.¹

§ 284. (2) *Contingent Remainders*.—Whether contingent remainders are subject to the Rule against Perpetuities has been much discussed. As the Rule governs all shifting and springing uses and executory devises, and all contingent limita-

for the benefit of the grantor personally. Whether this decision was consistent with the law as previously held in Massachusetts this is not the place to consider. In accord with the statement in this note are also *Neely v. Hoskins*, 84 Me. 386; *Ashuelot Nat. Bank v. Keene*, 74 N. H. 148; *Fuller v. Arms*, 45 Vt. 400; *Brice v. All Saints Mem. Chapel*, 31 R. I. 183; *Avery v. N. Y. Central R. R. Co.*, 106 N. Y. 142, 154, 155; *Post v. Weil*, 115 N. Y. 361; *Cunningham v. Parker*, 146 N. Y. 29; *Countryman v. Deck*, 13 Abb. N. C. 110; *Freer v. Glen Springs Sanatorium*, 131 N. Y. Ap. D. 352; *Mills v. Davison*, 54 N. J. Eq. 659; *Clark v. Martin*, 49 Pa. 289; *St. Peter's Church v. Bragaw*, 144 N. C. 126; *Watrous v. Allen*, 57 Mich. 362; *Lake Erie & W. R. R. Co. v. Priest*, 131 Ind. 413; *Wier v. Simmons*, 55 Wis. 637; *Carroll County Academy v. Galatin Academy Co.*, 104 Ky. 621; *Thornton v. Natchez*, 129 Fed. Rep. 84. And in Connecticut it is said

that all conditions which are not for the benefit of some individual or the public are void. *Mitchell v. Leavitt*, 30 Conn. 587. And see *Barrie v. Smith*, 47 Mich. 130. But see *Adams v. Valentine*, 33 Fed. Rep. 1. The decision of the Maryland cases, *Bennett v. Humane Impartial Soc.*, 91 Md. 10; and *Woman's Foreign Missionary Soc. v. Mitchell*, 93 Md. 199, was affected by the doctrine, peculiar to that State, that property cannot be given upon an express charitable trust. See § 245 *c*, *ante*. Cf. *May v. Boston*, 158 Mass. 21, 31; *Upington v. Corrigan*, 151 N. Y. 143; *Blanchard v. Detroit*, etc. R. R. Co., 31 Mich. 43; *Underhill v. Saratoga R. R. Co.*, 20 Barb. 455; *Aikin v. Albany*, etc. R. R. Co., 26 Barb. 289; *Douglas v. Hawes*, *Ritchie*, Eq. Dec. 146, 152; 11 Law Rep. Annotated, N. S. 509, note, *et seq.*

¹ See §§ 205–210, *ante*, and especially the qualification in § 205 *a*, *et seq.*

tions of personal property, whether in the form of remainders or not, it seems very desirable that contingent remainders should be subjected to the Rule also. Some reasons have, however, been suggested for exempting legal contingent remainders from the operation of the Rule against Perpetuities.

§ 285. I. That a contingent remainder can be destroyed by the tenant of the particular estate, inasmuch as a contingent remainder must be supported by an estate tail or an estate for life, and a tenant in tail can bar all remainders by a fine or recovery, while a tenant for life by a feoffment, fine, or surrender can destroy all contingent remainders dependent upon his estate. This view is advocated in two articles in the Jurist for 1844.¹ It is true that the indestructibility of executory devises led to the establishment of the Rule against Perpetuities, while the ease with which contingent remainders might be destroyed prevented or postponed the starting of any question as to their remoteness.² But while it is true that no remainder after an estate tail can be too remote, since it can be destroyed by docking the entail, the case is different with a contingent remainder after an estate for life. The docking of an estate tail is a lawful act, which no condition can restrain, while on the other hand a tortious conveyance by a tenant for life exposes him to a forfeiture of his estate; and if a trustee to support contingent remainders joins in a conveyance to destroy them, he commits a breach of trust.³ If a remainder cannot be too remote, the whole doctrine of *cy pres*⁴ falls to the ground; on a remainder to an unborn person for life, with remainder to his issue, there is no occasion to give such a person an estate tail, if the remainder to his issue is good.

§ 286. But it is needless to discuss this theory, the unsoundness of which Mr. Lewis has exposed,⁵ for both in England and very generally in America contingent remainders have

¹ 8 Jur. pt. 2, 20, 283.

⁴ See Chap. XIX., *post*.

² § 192, *ante*.

⁵ Lewis, Perp. Suppl. 130-136,

³ Mansell v. Mansell, 2 P. Wms. 140-142.

by statute ceased to be destructible.¹ If they were exempt from the operation of the Rule against Perpetuities, because they could be destroyed, now that they have become indestructible they must fall within it.

§ 287. II. That the old notion that you cannot have a possibility on a possibility has survived in the form of a prohibition of life estates to successive generations, and that this, and not the Rule against Perpetuities, governs the creation of remainders. The suggestion had been made before,² but it was brought into prominence by Sir Edward Sugden. In *Cole v. Sewell*,³ as Lord Chancellor of Ireland, he held that a contingent remainder dependent on an estate tail was barrable. There can be no doubt of the correctness of the decision, which was affirmed in the House of Lords. But the Lord Chancellor of Ireland not only held that contingent remainders after an estate tail were good, but he said that in all remainders remoteness was out of the question. His language is far from clear. It is given in the note.⁴ Mr. Lewis having commented on *Cole*

¹ See 1 Ill. Law Rev. 377, note 17; 4 Ill. Law Rev. 355.

² See §§ 195-199, *ante*.

³ 4 Dr. & W. 1; 2 Conn. & L. 344. See 5 Ir. L. 190, 595.

⁴ "As to the question of remoteness, at this time of day, I was very much surprised to hear it pressed upon the Court, because it is now perfectly settled, that where a limitation is to take effect as a remainder, remoteness is out of the question: for the given limitation is either a vested remainder, and then it matters not whether it ever vest in possession, because the previous estate may subsist for centuries, or for all time; or it is a contingent remainder, and then, by the rule of law, unless the event, upon which the contingency depends, happen, so that the remainder may vest *eo instanti* the

preceding limitation determines, it can never take effect at all. There was a great difficulty in the old law, because the Rule as to Perpetuity, which is a comparatively modern rule (I mean of recent introduction, when speaking of the laws of this country), was not known, so that, while contingent remainders were the only species of executory estate then known, and uses, and springing and shifting limitations were not invented, the law did speak of remoteness and mere possibilities as an objection to a remainder, and endeavored to avoid remote possibilities; but since the establishment of the Rule as to Perpetuities, this has long ceased, and no question now ever arises with reference to remoteness; for if a limitation is to take effect as a springing, shifting, or

v. *Sewell*,¹ Lord St. Leonards, in *Monypenny v. Dering*,² remarked: "In *Cole v. Sewell*, I said that the rule against a limitation to an unborn son of an unborn son was unaffected by what I there laid down;" and again: "The rule of law forbids the raising of successive estates by purchase to unborn children, that is to an unborn child of an unborn child. With this rule I have never meant to interfere, for it is too well settled to be broken in upon." And in his *Law of Property* he said that in *Cole v. Sewell* "the rule was admitted to be a continuing one, which forbids the creation of successive life estates to successive unborn classes of issue. So far the old

secondary use, not depending on an estate tail, and if it is so limited, that it may go beyond a life or lives in being, and twenty-one years, and a few months, equal to gestation, then it is absolutely void; but if, on the other hand, it is a remainder, it must take effect, if at all, upon the determination of the preceding estate. In the latter case, the event may or may not happen, before, or at, the instant the preceding estate is determined, and the limitation will fail, or not, according to that event. It may thus be prevented from taking effect, but it can never lead to remoteness. That objection, therefore, cannot be sustained against the validity of a contingent remainder. . . . The first instance of Mr. Fearne is taken from Coke, Littleton, 378 *a*, and the passage shows there was then a difficulty about remote possibilities which does not exist at this moment. Lord Coke, speaking of this, says: 'So it is if a man make a lease for life to A., B., and C., and if B. survive C., then the remainder to B. and his heirs: here is another exception out of the said rule, for

albeit the person be certain, yet inasmuch as it depends upon the dying of B. before C., the remainder cannot vest in C. presently: and the reason of both these cases in effect is, because the remainder is to commence upon limitation of time, viz. upon the possibilitie of the death of one man before another, which is a common possibilitie.' The concluding words show that in those early times they were looking to the period when the contingency might arise. The effect, however, of the modern Rule against Perpetuities has been to render this doctrine obsolete, although it has rendered void successive life estates to successive unborn classes of issue. In *Nicholls v. Sheffield*, 2 Bro. C. C. 215, the Court held that a proviso for shifting an estate after an estate tail was valid; and Lord Kenyon, who was then at the Rolls, would not listen to an argument founded on remoteness, because the limitation over might at any time be barred by the previous tenant in tail." 4 Dr. & W. 28-32.

¹ Perp. Suppl. 103-111.

² De G. M. & G. 145, 168, 171.

law was admitted to operate. . . . The limitation was not within the old rule forbidding the providing for a possibility upon a possibility."¹

§ 288. The notion that there could not be "a possibility upon a possibility" was no part of the common law. It was a conceit introduced by Chief Justice Popham in 1598,² due, as Mr. Williams himself says, to "the mischievous scholastic logic which was then rife in our courts of law;"³ and it was a passing conceit. Within twenty years Lord Coke, C. J., said: "If Popham's opinion should be law, it would shake the common assurances of the land;"⁴ and in *The Duke of Norfolk's Case*,⁵ in 1681, Lord Nottingham, C., said: "That there may be a possibility upon a possibility, and that there may be a contingency upon a contingency, is neither unnatural nor absurd in itself; but the contrary rule given as a reason by my Lord Popham in the *Rector of Chedington's Case* looks like a reason of art; but in truth has no kind of reason in it, and I have known that rule often denied in Westminster Hall."⁶ Not until 1765, in the case of *Chapman*

¹ P. 120. See Sugden, *Real Prop. Statutes* (2d ed.) 274, note (a).

Mr. Justice Kay, in *In re Frost*, 43 Ch. D. 246, 253, says that "Lord St. Leonards in *Cole v. Sewell* used language which has been read as meaning that the doctrine of remoteness never could apply to a contingent remainder," but that "the language refers simply to the case of an estate for life or an estate tail limited to a person *in esse*, when the limitation takes effect." "But none of that language contemplates the case of there being interposed a possible estate for life to a person not in existence, and a contingent remainder over on the death of that person." This is a just comment on *Cole v. Sewell*, but in the extract from his treatise

on Real Property, it must be conceded that Lord St. Leonards recognizes the continued existence of the doctrine of a possibility upon a possibility. Cf. Gilbert, *Uses* (Sugd. ed.) 119, note (2); Sugd. Pow. (8th ed.) 677; 1 Jarm. Wills (6th ed.) 354, note (d).

² *Rector of Chedington's Case*, 1 Co. 153 a, 156 b, §§ 125-133, *ante*, where the matter is more fully treated.

³ Wms. *Real Prop.* (22d ed.) 370.

⁴ *Blamford v. Blamford*, 3 Bulst. 98; 1 Roll. R. 318, 321.

⁵ 3 Ch. Cas. 1, 29.

⁶ § 133, note, *ante*. Wms. *Real Prop.* (22d ed.) 370. "I do not think that much reliance can be placed on the existence of an inde-

v. Brown,¹ is any suggestion to be found that such a theory is at the basis of the prohibition of a gift to the issue of an unborn child; and except as furnishing a ground for such prohibition, it is now universally admitted to be entirely exploded.²

§ 289. So much for the alleged ground of the supposed rule that, apart from the question of remoteness, you cannot limit successive life estates in remainder. But no trace of the rule itself is found until *Marlborough v. Godolphin* ³ (1759), and then it is not based on the "possibility upon a possibility" theory; and *Manning v. Andrews* ⁴ shows that before the establishment of the Rule against Perpetuities such limitations were deemed unobjectionable.⁵

§ 290. In short, the substitute offered to take the place of the Rule against Perpetuities as to remainders is a non-existent rule based on an exploded theory.

§ 291. Let us consider, however, this supposed rule a little more closely. It is sometimes said to be that you cannot give a remainder to the issue of a person unborn.⁶ But on a devise to A., a bachelor, for life, remainder to A.'s grandchildren in fee, the remainder is to the issue of unborn persons, yet it is unquestionably good,⁷ and the creation of such a remainder by the exercise of a power is of constant occurrence in practice.⁸

pendent rule of law forbidding a possibility on a possibility." *Per* Farwell, J., in *In re Ashforth*, [1905] 1 Ch. 535, 543. And Mr. Charles Sweet, while contending that the rule against contingent remainders being limited to successive generations still continues, condemns, in the strongest terms, the notion of double possibilities. Challis, *Real Prop.* (3d ed.) 118; 12 *Columbia Law Rev.* 200, 216, 219.

¹ 3 Burr. 1626; § 197, *ante*.

² § 133, note, *ante*. But now see § 298 *h h*, *post*.

³ 1 Eden, 404; §§ 195, 196, *ante*.

⁴ 1 Leon. 256 (1576), stated §§ 132, 132 *a*, *ante*.

⁵ §§ 191-199, *ante*.

⁶ Leake, *Land Law*, 334.

⁷ See *Brown v. Brown*, 86 Tenn. 277, 291-297.

⁸ See *Routledge v. Dorril*, 2 Ves. Jr. 357, 366; *Robert v. West*, 15 Ga. 122, 142. These were cases of personalty, it is true, but it has never been doubted that the same rule holds in legal remainders. See *Hockley v. Mawbey*, 1 Ves. Jr. 143, 150; Sugd. Pow. (8th ed.) 397, 677.

§ 292. The form in which the alleged rule is stated by Mr. Joshua Williams, its chief defender, is: "An estate cannot be given to an unborn person for life, followed by any estate to any child of such unborn person."¹ But suppose an estate is given to A., a bachelor, for life, remainder to A.'s eldest son for life, remainder to the eldest son of the eldest son of B., another bachelor, in fee. This does not come within Mr. Williams's rule. The eldest son of the eldest son of B. is the child of an unborn person, but the remainder to him does not follow an estate to that unborn person, but an estate to another unborn person; yet undoubtedly such remainder would be bad.

§ 293. Suppose, therefore, the rule is put in this form: "A remainder to the issue of an unborn person is bad if preceded by a life estate to an unborn person." But if an estate is given to A., a bachelor, for life, remainder to his eldest son for life, remainder to such of the other children of A. as survive his eldest son, the remainder to the younger children of A. is not to the issue of an unborn person but of a living person; but as it will not vest till the death of an unborn person, can any one doubt that it would be held bad?

§ 294. Suppose the rule takes this shape. A contingent remainder is not good unless it must vest within lives in being at the time of its creation; or, as Wood, V. C., puts it in *Cattlin v. Brown*,² "a contingent remainder cannot be limited as depending on the termination of a particular estate, whose determination will not necessarily take place within the period allowed by law."³ Now this is the Rule

¹ See Challis, Real Prop. (3d ed.) 115; Wms. Real Prop. (22d ed.) 370, 371.

² 11 Hare, 372, 374.

³ This is not quite exact. If the contingent event must happen within the required limits the remainder is good, although it follows an estate which may not terminate within those limits; e. g. to A., a

bachelor, for life, remainder to his eldest son for life, remainder to A.'s other children in fee. Here the remainder to A.'s younger children is contingent at its creation, but it must become vested, if ever, during the life of A., and is, therefore, unquestionably good. But see § 298 *h h, post*.

against Perpetuities, less the allowance of twenty-one years. But the allowance of the period of twenty-one years beyond lives in being formed no part of the original Rule. As has been shown,¹ it was established by erroneous reasoning, though it has now become a settled part of the Rule. There is no ground why it should not be added to the Rule in the case of contingent remainders if it is to be added in the case of other future limitations, and there is decided inconvenience in introducing arbitrary distinctions. If the period of twenty-one years has been adopted in the latter class it should be in the former. "The rule is stated in the able argument of Mr. Preston in *Mogg v. Mogg*.² He says: 'A gift to an unborn child for life is good, if it stops there; but if a remainder is added to his children or issue as purchasers, it is not good, unless there be a limitation of the time within which it is to take effect.'³ That is, I think, a perfectly accurate statement of the law which I am to apply to this case."⁴

§ 294 *a*. The rule then must take this form: a contingent remainder is good, if it must vest within twenty-one years after lives in being, but to this there is an exception, viz. such remainder is bad if it is preceded by a contingent remainder to such remainder-man's parent now unborn.⁵ What is the reason for this exception? It must be, either because it is required by the general policy of the law as to remoteness, or because it is required by a doctrine of the Common Law settled before the policy of the law as to remoteness had been established. It is not required for the former reason, for the general policy of the law as to remoteness calls for no such exception. It is not required by the second reason, because there is no evidence that such doctrine had been adopted into the Common Law, and it is no answer to say that if the policy of the law as to remoteness had not been established, the courts would, not improbably, have done something to meet this particular case.

¹ §§ 186-188, *ante*.

² 1 Mer. 654.

³ 1 Mer. 664.

⁴ *Per* Wood, V. C., *Cattlin v. Brown*, 11 Hare, 372, 375.

⁵ But now see § 298 *h h*, *post*.

§ 295. Mr. Williams's chief argument¹ for the doctrine that the Rule against Perpetuities does not apply to remainders was that no conveyancer had ever drawn a settlement giving remainders to those children of unborn children who should be born within twenty-one years after the settlor's death; but the answer is that no such settlements had in fact been drawn of personalty, and yet such limitations Mr. Williams himself would have agreed were good; and they have now been decided to be good. *In re Bowles*.²

§ 296. The notion which has led to the belief that contingent remainders are exempt from the operation of the Rule against Perpetuities seems to be that contingent remainders are common-law interests, and that the Rule was called into existence by the enactment of the Statutes of Uses and Wills, and for the purpose of restraining the creation of the interests first allowed by those Statutes, viz. shifting and springing uses and executory devises, and that it is confined to those interests. This is historically incorrect. It is true that contingent remainders came into the law without the aid of any statute, but they were not allowed till the fifteenth century, and they did not come into actual use in settlements until after the passage of the Statutes of Uses and Wills;³ and even when they were introduced into practice, as they were easily destructible, any inconvenience on the score of remoteness was little felt. Instead of the Rule against Perpetuities coming in upon the enactment of the Statutes of Uses and Wills, it was not distinctly announced from the Bench until *The Duke of Norfolk's Case*,⁴ in 1681, one hundred and forty odd years after the passage of those Statutes. And how novel a doctrine it then was appears from the fact that the decree of Lord Chancellor Nottingham, though finally approved by the

¹ Real Prop. (18th ed.) App. E.

² [1902] 2 Ch. 650. So the rule against "double possibilities" does not apply where there is a duty on a trustee to convert realty into

personalty. *Fonseca v. Jones*, 21 Manitoba, 168, 184.

³ § 134, *ante*.

⁴ 3 Ch. Cas. 1; § 169, *ante*.

House of Lords, was opposed to the opinions of the heads of the three superior courts of common law, and was reversed by his successor, Lord Keeper North. And so far is it from being true that the Rule against Perpetuities was introduced only against interests created by the Statutes of Uses and Wills, that, in fact, it was to a common-law limitation that the Rule owed its development. Executory devises of chattels real were common-law interests. There could be no use of a chattel, and chattels were always devisable at common law. But it was in the long line of cases touching these common-law interests, culminating in *The Duke of Norfolk's Case* itself, that the Rule against Perpetuities grew and took its shape.¹

§ 296 *a*. Mr. Sweet in a note to Challis, Real Prop. (3d ed.) 210, while not denying that executory devises of chattels were allowed at the time when the Rule against Perpetuities was established, and that it was in the consideration of them that the Rule was formulated, says that they were not allowed until *Manning's Case*,² and that therefore they were not common-law interests. If no doctrine is to be considered as part of the common law unless it was in force at the time of the Heptarchy, or the Norman Conquest, or some other selected date in the Middle Ages, then few doctrines are parts of the common law; for instance, contingent remainders themselves are not common-law interests. It is submitted that it is both usual and accurate to describe a doctrine which has become settled in the law without the aid of a statute as a common-law doctrine. The real point in issue is whether, before the Rule against Perpetuities was developed, such a doctrine had become established without the aid of statutes. Mr. Sweet, surely, cannot be suspected of holding to the vulgar error that judges cannot make law.³

§ 297. If it were true that contingent remainders are not subject to the Rule against Perpetuities, because they are common-law interests, then bequests of chattels, real or

¹ §§ 148-158, 160-169, *ante*.

² 8 Co. 94 *b*.

³ See Gray, *Nature and Sources of the Law*, §§ 465-512.

personal, would not be subject to the Rule, for they owe nothing to any statute; and (to say nothing of rights of entry for breach of condition and possibilities of reverter) easements, rents, and terms for years could be created to begin on the most distant contingencies.¹ So, again, if it was necessary in order that an interest should be subjected to the Rule against Perpetuities, that it should owe its existence to the Statute of Uses or of Wills, all equitable interests of every description would be free from any restraint of the Rule, for equitable interests existed long before those statutes. Yet no one questions that to-day they are within the scope of the Rule.²

§ 298. The Rule against Perpetuities is, comparatively speaking, a modern rule. No need of restraining future interests was felt in the early times. The need was first felt in connection with executory devises of chattels, which were common-law interests. As to springing and shifting uses and executory devises of freeholds, the courts hesitated at first whether they should be held indestructible; finally they were held indestructible, and a need then arose for the application of the Rule against Perpetuities to these statutory interests also. Contingent remainders long remained destructible, and no practical necessity therefore was felt of considering the Rule in connection with them. The Rule was created and was gradually shaped by the courts to restrain future interests within twenty-one years after a life in being. When formed, it was applied to common-law and statutory interests, to executory devises of leaseholds and of freeholds alike, it was created to effect a general end of public policy, and there is no reason in history or policy why all future interests should not fall within it. Such is the spirit, if not the actual decision, in *London & S. W. R. Co. v. Gomm*.³ The fautors of the

¹ See §§ 300-302, 312, 315, 316, 319, 321, *post*.

² § 323, *post*.

³ 20 Ch. D. 562. See Chap. V., *ante*. Mr. Lewis is the ablest advo-

cate of the view that remainders are subject to the Rule against Perpetuities. Lewis, *Perp.* c. 16, and especially Suppl. 97-153. See to the same effect 1 Jarm. Wills (4th

view that the Rule against Perpetuities should not apply to common-law interests treat the Rule as if it was a statute directing only how springing and shifting uses and executory devises should be dealt with. They admit that the judges have applied the Rule to common-law interests, but they think the judges have been wrong in so doing.¹ But the Rule is not a statute, it is judge-made law, and there seems no reason why, as cases arise, the judges should not define the scope of the law that they have made. The phenomenon is common enough, as, for instance, in mercantile law.

§ 298 *a*. Since the first edition of this book the case of *Whitby v. Mitchell*² has been decided. Kay, J., there held that the rule that successive life-estates could not be limited is "not only an application of the law against perpetuities; it is something more than that." "For that proposition I do not want any higher authority than that of the late Mr. Joshua Williams. . . . He says . . . that it is an absolute rule independent of the rule against perpetuities. With that I entirely agree." The learned judge made no examination of the authorities. In this case legal remainders to unborn children of unborn children after life estates to their parents were declared to be bad, although they were so limited as not to infringe the Rule against Perpetuities. This decision was affirmed by the Court of Appeal.³ Cotton, L. J., said: "You cannot have a limitation for the life of an unborn person, with a limitation after his death to his unborn children to take as purchasers.

ed.) 255-258, 260-263; (5th ed.) 218-221, 223-226; 2 Jarm. Wills (4th ed.) 845; 60 L. T. 247; 69 L. T. 360; Theob. Wills (2d ed.) 424-429; (see 5th ed. 520); Tud. L. C. in Real Prop. (3d ed.) 470-475; 1 Hayes, Conv. (5th ed.) 494, 495; Wood *v. Griffin*, 46 N. H. 230, 235. *Contra*, Wms. Real Prop. (13th ed.) 274-277, (22d ed.) 369-372, 417-424; 8 Jur. pt. 2, 20, 283; 69 L. T. 336; Challis, Real Prop.

(3d ed.) 115, 187 *et seq.*, 197 *et seq.* See generally Sugd. Pow. (8th ed.) 393, 394; Fearn, C. R. 501; 3 Dav. Prec. Conv. (3d ed.) 270, 336-338; Third Rep. Real Prop. Comm. 29-31; Marsden, Perp. c. 8; 2 Vaizey, Settle. 1154.

¹ See Mr. Challis and Mr. Sweet, in Challis, Real Prop. (3d ed.) *passim*.

² 42 Ch. D. 494; 44 Ch. D. 85.

³ 44 Ch. D. 85.

That is the same thing as what has been called 'a possibility upon a possibility.' But it is said that, although there is such a rule in existence, that is superseded by the more modern rule against perpetuities. In my opinion the old rule with regard to a possibility on a possibility has not been done away with by this modern rule." Lindley, L. J., said: "I entertain no doubt myself that Mr. Joshua Williams' observations on this subject are correct from beginning to end, and I do not know that I could express my views better than he did. I do not know, any more than he seems to have done, the exact meaning of the old rule as to a possibility upon a possibility; and if any one turns to the passage in Coke upon Littleton where it is discussed, I hope he will understand it better than I do. I confess I do not understand it now and never did. But, at all events, it gave rise to the rule which everybody can understand . . . 'that, if land is limited to an unborn person during his life, a remainder cannot be limited, so as to confer an estate by purchase on that person's issue.' . . . The rule against perpetuities was invented much later, on account of the law of shifting uses and executory devises. . . . The old rule against double possibilities is a rule that has not been abrogated." Lopes, L. J., said: "That there was an old rule that an estate could not be limited to an unborn child of an unborn person has been admitted, and, in fact, cannot be denied. It was an old rule originating out of the feudal system. But it is said that, although this old rule did once exist, it has been superseded by the rule against perpetuities. . . . I have no doubt . . . that these are two independent and coexisting rules."

§ 298 c. The most striking thing about the opinions both of Kay, J., and of the judges of the Court of Appeal in *Whitby v. Mitchell* is the way in which they rest on the opinion of Mr. Joshua Williams. A writer in the Solicitors' Journal says:¹ this "shows the advantage of having text-books of such authority that judges of the Court of Appeal and the youngest students can alike take their law from them."

¹ 34 Sol. J. 343, 344.

§ 298 *d.* The decision in *Whitby v. Mitchell* was criticised by Mr. J. Savill Vaizey in the *Law Quarterly Review*,¹ by an anonymous writer in the *Law Times*,² and by Mr. T. Cyprian Williams in the *Law Quarterly Review*.³ Mr. Vaizey and Mr. Williams discussed elaborately the authorities given in the preceding sections, and their conclusion coincided with the result reached in the first edition of this book.

§ 298 *e.* Mr. Ernest C. C. Frith and Mr. Charles Sweet have published articles⁴ defending *Whitby v. Mitchell*. The matter has now been so thoroughly threshed out, that the only important addition to be hoped for in aid of the discussion would seem to be the discovery of authorities previously unknown or unnoticed. Mr. Sweet has recognized this, and believes that he has found two authorities previously unnoticed, which bear upon the question. The first of these is a *dictum* of Popham, C. J., in *Chudleigh's Case*:⁵ "He said, if a feoffment be made to the use of A. for life, and after to the use of every person who should be his heir, one after another, for the term of their life of every such heir only; in this case, if this limitation should be good, the inheritance would be in nobody; but this limitation is merely void, for the limitation of a use to have a perpetual freehold is not agreeable with the rule of law in estates in possession." To this may be added a later *dictum* of his in the same case:⁶ "If the said case before put of a perpetual freehold should be maintained, that no heir shall have but an estate for life, and that the inheritance shall be in nobody, what escheat, or ward, or heriot, or other profit will accrue to the King or other lords?"

§ 298 *f.* On these *dicta* it may be remarked that they do not appear in Popham's own report of his opinion.⁷ And again no one doubts that Chief Justice Popham had a private

¹ 6 *Law Quart. Rev.* 410.

² 88 *Law Times*, 95.

³ 14 *Law Quart. Rev.* 234.

⁴ 14 *Law Quart. Rev.* 133; and

15 *Law Quart. Rev.* 71.

⁵ 1 *Co.* 120 *a.*, 138 *a.*

⁶ 1 *Co.* 139 *b.*

⁷ *Pop.* 70, 76, 84.

conceit that there could not be "a possibility upon a possibility"; a conceit which was condemned as bad law by Lord Coke and Lord Nottingham.¹ But, it is submitted, Chief Justice Popham had not here in mind any rule that there could not be a possibility upon a possibility, either in the form given to it in modern times that after a life estate to an unborn person you cannot give an estate to that person's child, or in any other form. If he had, he would have said that A. would have had an estate for life and his heir, a remainder for life, and that the other limitations would be void. What he meant was that if you give an estate in fee you cannot add a provision that each successive tenant shall hold only for life, a proposition which is undoubtedly good law,² but which has nothing to do with a possibility upon a possibility. To make Popham's *dictum* any authority for the proposition that you cannot have an estate in remainder after a life estate to an unborn person, we have to suppose that he meant to say that the life estate to A. was good; that the life estate to A.'s heir was good; and that the other estates were void; it is submitted that it is impossible to extract such a meaning from the passage.

§ 298 *g*. Mr. Sweet's second authority is a passage in the Touchstone: "Uses that are against the rules of the common law, shall not be executed by this statute: and therefore, if a feoffment be made to the use of A. for life, and after to the use of every person that shall be his heir one after another for term of his life . . . these uses shall not be executed, because these limitations are wholly void."³ This is evidently taken from Popham's *dictum*, and the same remark is applicable to it as to that *dictum*.

§ 298 *h*. It is likely enough that if the case of a remainder to an unborn person for life, with remainder to such unborn person's son, had been presented to the courts, they would have invented some rule to declare the latter remainder void,

¹ See §§ 125, 133, *ante*.

² § 656, *post*.

³ Shep. Touch. 506.

but that any such rule had in fact been invented before the Rule against Perpetuities is, so far as the evidence goes, a pure fiction. Some rule restraining the creation of remote interests was certain some time or other to be formulated. The rise and development of the Rule against Perpetuities through a series of years is plainly to be read in the reports. No reference to any prior rule is to be found until a hundred years after the Rule against Perpetuities was established. It requires a pretty robust faith in the infallibility of Mr. Joshua Williams to believe in the real existence of such prior rule. The matter is in this singular condition. On the one hand there are assertions by some of the most distinguished judges and writers that before the Rule against Perpetuities was adopted there was in existence a rule that after a life estate to an unborn person there cannot be a remainder to his issue; and on the other hand there is absolutely no evidence whatever that those assertions are correct.¹

§ 298 *hh*. Mr. Sweet is now of opinion, "after some hesitation," that there is a rule against "two successive contingent remainders" or "a contingent remainder on a contingent remainder," which is not identical with the rule in *Whitby v. Mitchell* against a contingent remainder to the issue of an unborn person preceded by a contingent remainder to such unborn person.² There have been some recent judicial expressions supporting this view: *In re Frost*;³ *Whitting v. Whitting*;⁴ *Will of Malin*;⁵ and very recently a single decision, *In re Park's Settlement*.⁶ It is impossible to say what are the limits of the doctrine in these cases. It seems almost as objectionable as the notion of a possibility on a possibility. Mr. Sweet himself says, with regard to *In re Park's Settlement*,

¹ For a further discussion of Mr. Sweet's view see App. K, § 931; and cf. the opinions of the learned judges in *Will of Malin*, [1912] Vict. L. R. 259.

² 12 Columbia Law Rev. 199, 216; 29 Law Quart. Rev. 304.

³ 43 Ch. D. 346.

⁴ 53 Sol. J. 100.

⁵ [1912] Vict. L. R. 259, 269.

⁶ [1914] 1 Ch. 595.

the only case decided squarely on such a doctrine: "Having regard to these authorities [*Re Frost* and *Whitting v. Whitting*] it is difficult to see how the learned judge could have decided differently, but the result is unsatisfactory, not to say absurd."¹

§ 298 *i*. The case of *Whitby v. Mitchell* decides that there is a doctrine other than the Rule against Perpetuities which applies to contingent remainders, but it does not decide that the Rule does not apply to them; on the contrary, it rather implies that it does; and it has now been determined that the Rule does apply to them. *In re Frost*.² *In re Ashforth*.³ *Whitby v. Von Luedecke*.⁴

§ 299. (3) *Rights of Entry for Condition Broken*.—When a feoffment was made on condition at common law, a right of entry for condition broken remained in the feoffor.⁵ Such a right was not affected by the Statute *Quia Emptores*.⁶ In the older books there are instances of feoffments and grants on condition, but the objection of remoteness was no more taken to them than it was to other future interests.⁷ Afterwards the practice of entering for condition broken became obsolete. Provisions conditional in form were construed as creating a present trust, and not as true conditions, and consequently there came to be little occasion for applying the Rule against Perpetuities.⁸ It is true that in some English cases words of condition could not have been held to create a trust, but as giving only a right of entry to determine an estate. But no instance has been discovered of such a condition, for longer than a lifetime, attached to a fee simple,⁹ except *Flower v.*

¹ 30 Law Quart. Rev. 135, 357.

² 43 Ch. D. 246.

³ [1905] 1 Ch. 535.

⁴ [1906] 1 Ch. 783, and so *Will of Malin*, [1912] Vict. L. R. 259.

Mr. Charles Sweet, 1 Jarm. Wills (6th ed.) 368, 369, does not regard these decisions as satisfactory; as is natural, for they are inconsistent with his view that the

Rule against Perpetuities does not apply to common-law interests, as to which see §§ 299 *et seq.*, *post*.

⁵ § 12, *ante*.

⁶ § 30, *ante*.

⁷ § 123, *ante*.

⁸ § 282, note, *ante*.

⁹ Such conditions, for instance, names and arms clauses, are often attached to estates tail; but as they can be destroyed by fine or re-

Hartopp,¹ where the condition was held to be destroyed, and no question of remoteness was raised. The Real Property Commissioners, indeed, in their Third Report, say: "The following case frequently occurs in practice, and, as far as we know, has never been determined; an estate is devised to A. B., 'his heirs and assigns,' on condition that he and they should take, and continue to use, the name and arms of C. D." ² One hesitates to doubt a statement of this kind made by so distinguished a body, but considerable research has disclosed, neither in the reports, nor in the text-books, nor in the books of precedents, any suggestion of adding such a condition extending beyond a lifetime to a conveyance in fee simple. Nor does it seem a likely occurrence. A person with so strong a desire to preserve an estate in his family name as to insert such a clause would be almost certain to put the estate into strict settlement. Besides if the estate were given in fee simple, it would either be to the heir, in which case the condition would be inoperative, or it would be given with the desire to exclude the heir, and in that case it would be unlikely that a condition should be inserted which would carry the estate to the heir.

§ 300. The Real Property Commissioners, in their Third Report,³ also say of such rights of entry that they seem not to be confined within the Rule, but that "they are clearly within the policy, which the law has adopted with respect to perpetuities."

§ 300 *a*. The two reasons which have been suggested for excluding rights of entry for breach of condition from the operation of the Rule against Perpetuities are: (1) That they are common-law interests. But the Rule applies to common-law interests.⁴ (2) That they can be released. But interests which can be aliened or released are within the Rule.⁵

covery, no question of remoteness arises with regard to them.

¹ 6 Beav. 476.

² P. 36.

³ P. 36.

⁴ See the remarks on this ob-

jection in connection with contingent remainders, §§ 296-298, *ante*. See also §§ 312, 315, 316, 319, 321, 323, *post*.

⁵ See Chap. VII., *ante*.

§ 301. The theory of the Real Property Commissioners that rights of entry for breach of condition are not within the Rule is denied by Mr. Lewis¹ and by Mr. Sanders.² In *Re Macleay*³ there was a devise to the testator's brother, "on the condition that he never sells out of the family." Jessel, M. R., held that the condition was good. He remarked: "First of all, it is to be observed that the condition, good or bad, is confined within legal limits; it is applicable merely to the devisee himself, and therefore is not void on any ground of remoteness."⁴ And again: "It is not, strictly speaking, limited as to time, except in this way, that it is limited to the life of the first tenant in tail;⁵ of course, if unlimited as to time, it would be void for remoteness under another rule."⁶

§ 302. Afterwards, in *Dunn v. Flood*,⁷ there was a bill by a vendor for specific performance. The land was subject to a condition that if it was used for certain trades, the grantor might enter and take the rents until the trades were discontinued, and for three months longer. North, J., held that the condition was void for remoteness and no objection to a decree for specific performance, although he refused the decree on other grounds.⁸ And now *In re Hollis's Hospital*,⁹ Byrne, J., in an elaborate opinion, has held that common-law conditions are subject to the Rule against Perpetuities, although he refused to force a title dependent on the invalidity of such a condition upon a purchaser. And in *In re Da Costa*¹⁰

¹ Perp. 616, 617. Whether the condition attached at common law to an exchange is without the Rule against Perpetuities, as Mr. Lewis thinks (Perp. 615), is idle to inquire, since exchanges became obsolete before the Rule was established.

² 1 Sand. Uses (5th ed.) 207.

³ L. R. 20 Eq. 186.

⁴ L. R. 20 Eq. 187, 188.

⁵ It should be "tenant in fee simple."

⁶ L. R. 20 Eq. 190.

⁷ 25 Ch. D. 629.

⁸ In the Court of Appeal judgment was affirmed. Baggallay, L. J., said: "We have not heard the counsel for the defendant, but as at present advised I concur with Mr. Justice North that this right could not be enforced, being void under the Rule against Perpetuities." *Dunn v. Flood*, 28 Ch. D. 586, 592.

⁹ [1899] 2 Ch. 540.

¹⁰ [1912] 1 Ch. 337.

Eve, J., held that a common-law condition was obnoxious to the Rule against Perpetuities. In face of these opinions and cases, the statement of the Real Property Commissioners, unsupported by any case or *dictum*, must be deemed erroneous.¹

§ 303. Mr. Lewis, although holding that rights to enter for condition broken are in general obnoxious to the Rule against Perpetuities, yet believes that rights of entry for non-payment of rent are not within it.² This is true as to conditions attached to leases for years; the interest of the reversioner is a vested interest, and to that the Rule does not apply.³ So the right to enter and hold until the arrears of rent are discharged is, perhaps, like the right to distrain, merely a matter of remedy and not within the Rule.⁴ But a right contained in a conveyance in fee for the grantor, on failure of payment of rent, to enter and be in of his old estate seems like any other condition, to be within both the letter and the spirit of the Rule.⁵ Such rights, indeed, existed in early years, when no objection to the remoteness of any future interests

¹ See Marsden, Perp. 4, 5; Gray, Restraints on Alienation, §§ 42, 51. Mr. Challis, in his treatise on Real Prop. (3d ed.) 187-190, is of a contrary opinion; and agreeing with him are Mr. Charles Sweet in his editions of Challis and Jarman (Challis, Real Prop. (3d ed.) 210 *et seq.*; 1 Jarm. Wills (6th ed.) 374), and Mr. Cyprian Williams, 1 Vend. & P. (2d ed.) 677, 678. And that a common-law condition was not within the Rule against Perpetuities was said, after full discussion in Ireland in 1895, *A. G. v. Cummings*, [1906] 1 I. R. 406.

² Perp. 618, 619.

³ § 209, *ante*.

⁴ See § 273 *a*, *ante*; 1 Wms. Vend. & P. (2d ed.) 435, 436; 17 Law Quart. Rev. 32. So though the right is to enter on lands not included in the grant or demise.

Lewis, Perp. 619. See *Daniel v. Stepney*, L. R. 7 Ex. 327, L. R. 9 Ex. 185, in which the Court of Exchequer Chamber, overruling the Court of Exchequer, held that a right under a lease for forty years to distrain for rent on other land of the lessee was good, without the objection of remoteness being raised. Marsden, Perp. 248, 249. It was perhaps good as a matter of remedy.

⁵ See 99 L. T. 596; Elphinstone, *Introd. to Conv.* (4th ed.) 115; Copinger & Munro, *Rents*, 64-68; 1 Wms. Vend. & P. (2d ed.) 435. But in 17 Law Quart. Rev. 32, Mr. Arthur J. Mackey in a learned article contends that such a right to enter is not obnoxious to the Rule. Cf. Foulke, *Treatise*, § 367.

had been made;¹ but in later times they have been disused, and rights to enter and hold until rent is paid have been employed instead; and, even when absolute in form, they are treated in equity as only entitling the grantor to hold until rent is paid.²

§ 304. Though rights of entry for condition broken are within both the letter and the spirit of the Rule against Perpetuities; though there is nothing in the history of the Rule to exempt them from its operation; though they are held to be subject to it in England; though the practical inconvenience of excluding them is very great; and though this inconvenience is especially great in America, where the heirs from whom a release must be sought may, and often do, multiply enormously with every succeeding generation, — yet in America conditions violating the Rule against Perpetuities have been repeatedly upheld, and forfeitures for their breach enforced.³

§ 305. It is true that in almost none of these instances has the objection of remoteness occurred to either court or counsel. Those cases in which it is reported to have been mentioned, either at the bar or from the bench down to 1886, the date of the first edition of this book, are as follows:—

(1) *Canal Bridge v. Methodist Religious Soc.*⁴ (1847). Mr. Fletcher, as counsel for the tenant, objected to a condition that land granted should be forever appropriated to the maintenance of public worship, on the ground that it attempted to create a perpetuity, citing Lewis on Perpetuities. This is the first reported instance of the question of remoteness being discussed by counsel in connection with conditions. The Court decided in favor of the tenants on another ground, and took no notice of the objection.

¹ Lit. §§ 325–327.

² Co. Lit. 203 *a*, Butler's note, (3). 3 Cruise, Dig. 286. 2 L. C. in Eq. (5th ed.) 1117–1120. Tud. L. C. in Real Prop. (3d ed.) 312. See Gilbert, Rents, 135–137. Cf. *Dunn v. Flood*, in the preceding

section, where a right to enter and hold not only till the default ceased, but for three months more, was considered to be bad.

³ See *Kales, Fut. Int.* in Ill. § 257; *Foulke, Treatise*, § 367.

⁴ 13 Met. 335, 348.

(2) *Brattle Square Church v. Grant*¹ (1855). Here is a *dictum* of Bigelow, J., that the Rule against Perpetuities does not govern rights of entry for condition broken, because such rights can be at all times released. The unsoundness of this reason has been shown.² The most singular thing about the remark is that in this very case an executory devise which could at any time have been released, precisely like a right to enter for breach of condition, was held void for remoteness.

(3) *Indian Orchard Canal Co. v. Sikes*³ (1857). Land was conveyed to A. on condition that no building thereon should be occupied or used for the sale of spirituous liquors. On a writ of entry by the grantor, based on a breach of condition, the judge ruled that a sale with the knowledge of A. was a breach, but that a sale without A.'s knowledge was not a breach. The jury found for the tenant, and the demandant alleged exceptions. At the argument on the exceptions the counsel for the tenant contended, *inter alia*, that the condition was void as an attempt to create a perpetuity. The full Court gave judgment on the verdict without delivering any opinion, presumably on the grounds stated at the trial.

(4) *Sharon Iron Co. v. Erie*⁴ (1861). Counsel argued that a condition violated the Rule against Perpetuities; but as the Court held that there had been a waiver of the breach, if any, it had no occasion to consider, and did not consider, the objection on the score of perpetuity.

(5) *Hunt v. Wright*⁵ (1867). An undivided part of land was conveyed to H. and his heirs, on condition that the premises should be held by H. and his heirs and assigns in common with the tenants of the other undivided parts, without partition or division, subject to certain articles of association. Held, on a petition by H. for partition, that he was estopped to have it. The Court were of opinion that this condition was not "invalid as creating a perpetuity;" that the condition

¹ 3 Gray, 142, 148.

² Chap. VII., *ante*.

³ 8 Gray, 562.

⁴ 41 Pa. 341.

⁵ 47 N. H. 396.

was not repugnant; that tenancies in common were not compulsorily partible at common law; that there was no restraint on alienations; and that the articles could be dissolved at any time. Assuming that the condition was not repugnant, and would have been good if confined within limits, there would seem to be no difference between it and any other remote contingent interest. Though the Court speak of the condition as creating a perpetuity, they do not seem to have contemplated the question of remoteness, but to have used this term as meaning "an inalienable interest."¹

(6) *French v. Old South Society*² (1871) is the first case in the books in which the question of a condition being bad for remoteness was presented by counsel and passed upon by the Court. A pew was there sold by the defendants, on condition that the grantee and his legal representatives should pay to the defendants the tax assessed on the pew, and also on the condition that he or they should offer the pew to the defendants upon leaving the meeting-house. Chapman, C. J., said: "The doctrine that conditions against alienation in a conveyance are void has never been held to be applicable to conveyances of pews, for the reasons stated by Chief Justice Shaw, and cited above. The tenure by which pews are held in this Commonwealth is peculiar. It is objected that the Rule against Perpetuities makes the conditions of the plaintiff's deed void. If a perpetuity may be defined as 'an estate unalienable though all mankind join in the conveyance' (see *Scatterwood v. Edge*, 1 Salk. 229), or 'where, if all that have interest join, yet they cannot bar or pass the estate' (see *Washborn v. Downs*, 1 Ch. Cas. 213), here is no violation of the Rule; for the plaintiff and defendants could at any time join in a conveyance of the property. The grantee took an estate on condition subsequent, and the possibility of reverter remaining in the grantor on breach of the condition is not

¹ See § 141 *e*, *ante*; Gray, *Restraints on Alienation* (2d ed.), § 30.

² 106 Mass. 479.

subject to the Rule against Perpetuities, even if the pew is held as real estate, *Brattle Square Church v. Grant*, 3 Gray, 142." But the suggested definition of a perpetuity is incorrect;¹ and the case of *Washborn v. Downs*, and the remark cited from it, had reference to the barring of an estate tail. The opinion of the learned Chief Justice goes upon the assumption that the alienation of pews can be indefinitely restrained. This takes them out of the class of ordinary interests to which the Rule against Perpetuities applies, and classes them with charities, which are not obnoxious to the objection of remoteness. How far this assumption is correct, and how far a pew in a church can be considered as devoted to charity, particularly if it is in the church of a religious body which is not itself a charity,² this is not the place to consider. It is obvious that the case is of slight authority on the objection of remoteness to conditions generally.

(7) *Lawe v. Hyde*³ (1876). In this case counsel contended that a condition for the maintenance of a college was bad as a perpetuity. The Court held that there had been no breach.

(8) *Tobey v. Moore*⁴ (1881). Here it was held that restrictions on the use of land, not involving any risk of forfeiture, were free from any objection on the ground of remoteness. The Court said: "The rule against Perpetuities, which governs limitations over to third persons to take effect in the future, has never been held applicable to conditions, a right of entry for the breach of which is reserved to the grantor or devisor and his heirs, and may be released by him or them at any time. Sugd. Vend. (14th ed.), 596. *Gray v. Blanchard*, 8 Pick. 284. *Austin v. Cambridgeport Parish*, 21 Pick. 215. *Brattle Square Church v. Grant*, 3 Gray, 142, 148, 161. *French v. Old South Society*, 106 Mass. 479. *Cowell v. Springs Co.*, 100 U. S. 55. But this case does not require us to consider whether there are

¹ See Chap. VII., *ante*.

³ 39 Wis. 345.

² *Old South Soc. v. Crocker*, 119

⁴ 130 Mass. 448.

Mass. 1. But now cf. *Sears v. A. G.* 193 Mass. 551.

any conditions strictly so called to which the rule should be applied." The above, with *Giles v. Boston Society*,¹ *Piper v. Moulton*,² and *Coit v. Comstock*,³ considered later,⁴ were the only reported cases in which the objection of remoteness with reference to conditions had, at the date of the first edition of this book, been passed upon or suggested by court or counsel in America.⁵

§ 306. But although *French v. Old South Society* was the only case in which any court in America had passed upon the objection of remoteness in a condition, and the facts of that case make it of little value as a precedent, yet there have been numerous decisions in America by which conditions violating the Rule against Perpetuities have been sustained, without any objection of remoteness apparently occurring to any one. They are given in a note.⁶

§ 307. In very many cases also in which the effect of conditions extending beyond the limits of the Rule against Perpetuities has been involved, but in which the courts have

¹ 10 Allen, 355.

² 72 Me. 155.

³ 51 Conn. 352.

⁴ § 311, *post*.

⁵ In 1 Am. Law Rev. 265, is an article by Mr. F. C. Loring, in which he contends that conditions are within the Rule against Perpetuities. For later cases in which the objection is considered, see § 310 *a*, *post*.

⁶ *Cowell v. Springs Co.*, 100 U. S. 55. *Carter v. Doe*, 21 Ala. 72. *Stock v. Stipe*, 12 Ind. 74. *Indianapolis R. R. Co. v. Hood*, 66 Ind. 580. *Taylor v. Cedar Rapids, etc. R. R. Co.*, 25 Iowa, 371. *O'Brien v. Wetherell*, 14 Kans. 616. *Gray v. Blanchard*, 8 Pick. 284. *Austin v. Cambridgeport Parish*, 21 Pick. 215. *Guild v. Richards*, 16 Gray, 309. *Langley v. Chapin*, 134 Mass.

82. *Smith v. Barrie*, 56 Mich. 314. *Sioux City St. P. R. Co. v. Singer*, 49 Minn. 301. *Cornelius v. Ivins*, 2 Dutch. 376. *Jackson v. Topping*, 1 Wend. 388. *Plumb v. Tubbs*, 41 N. Y. 442. *Howell v. Long Island R. R. Co.*, 37 Hun, 381. *Upington v. Corrigan*, 151 N. Y. 143. *Sperry v. Pond*, 5 Ohio, 387. *Pickle v. M'Kissick*, 21 Pa. 232. *Courtney v. Keller*, 4 Pennyp. 38. *Lehigh Coal Co. v. Gluck*, 5 Pa. C. C. 662. *Fly v. Guinn*, 2 Tex. Unrep. Cas. 300. *Martin v. Ohio River R. R. Co.*, 37 W. Va. 349. *Horner v. Chicago, etc. R. R. Co.*, 38 Wis. 165. *Pepin County v. Prindle*, 61 Wis. 301. *Goyeau v. Gt. West R. Co.*, 25 Grant, 62. *Re Melville*, 11 Ont. 626. Cf. *Hardy v. Gallo-way*, 111 N. C. 519.

held that there has been no forfeiture, either because there has been no breach or no entry, or because the right to enter has been waived, released, or destroyed, the validity of the conditions has been declared or assumed as unquestioned without any objection on the ground of remoteness.¹

§ 308. And further, in those cases in which the condition must be broken, if at all, within lives in being and twenty-one years, no suggestion has ever been made in America that this circumstance is what saves the condition from being too remote.²

¹ Among such cases are *Henry v. Etowah County*, 77 Ala. 538; *Collins Manufacturing Co. v. Marcy*, 25 Conn. 242; *Warner v. Bennett*, 31 Conn. 468; *Price v. School Directors*, 58 Ill. 452; *Carter v. Branson*, 79 Ind. 14; *Gray v. Chicago, M. & St. P. Ry. Co.*, 189 Ill. 400; *Lyman v. Suburban R. R. Co.*, 190 Ill. 320; *Kenner v. Amer. Contract Co.*, 9 Bush, 202; *Hooper v. Cummings*, 45 Me. 359; *Osgood v. Abbott*, 58 Me. 73; *Crane v. Hyde Park*, 135 Mass. 147; *Michigan State Bank v. Hastings*, 1 Doug. (Mich.) 225; *Memphis & Charleston R. R. Co. v. Neighbors*, 51 Miss. 412; *Gillis v. Bailey*, 17 N. H. 18; 21 N. H. 149; *Gage v. School District in Boscawen*, 64 N. H. 232; *Den d. Southard v. Central R. R. Co.*, 2 Dutch. 13; *McKelway v. Seymour*, 5 Dutch. 321; *De Peyster v. Michael*, 6 N. Y. 467, 506; *Ludlow v. N. Y. & H. R. R. Co.*, 12 Barb. 440; *Underhill v. Saratoga, etc. R. R. Co.*, 20 Barb. 455; *Tinkham v. Erie R. Co.*, 53 Barb. 393; *Woodworth v. Payne*, 5 Hun, 551; 74 N. Y. 196; *Towle v. Remsen*, 70 N. Y. 303; *McKisick v. Pickle*, 16 Pa. 140; *Sharon Iron Co. v. Erie*, 41 Pa. 341; *Ham-*

mond v. Railroad Co., 15 So. Car. 10; *Bolling v. Petersburg*, 8 Leigh, 224; *Congregational Soc. v. Stark*, 34 Vt. 243; *Mills v. Evansville Seminary*, 58 Wis. 135; *Douglas v. Hawes, Ritchie Eq. (Nov. Sc.)* 146, 152. See *Conn. Spiritualist Camp-Meeting Assoc. v. E. Lyme*, 54 Conn. 152; *Barrie v. Smith*, 47 Mich. 130; *Watrous v. Allen*, 57 Mich. 362; *Bad River Lumbering Co. v. Kaiser*, 82 Wis. 166.

² See, for instance, *Taylor v. Sutton*, 15 Ga. 103; *Voris v. Renshaw*, 49 Ill. 425; *Wilson v. Wilson*, 86 Ind. 472; *Rowell v. Jewett*, 69 Me. 293; 71 Me. 408; *Hayden v. Stoughton*, 5 Pick. 528; *Clapp v. Stoughton*, 10 Pick. 463 (cf. *Brattle Square Church v. Grant*, 3 Gray, 142, 161); *Blake v. Blake*, 56 Wis. 392; *Delong v. Delong*, Id. 514; *Gilchrist v. Foxen*, 95 Wis. 428.

In the cases in the two preceding sections a forfeiture was enforced, or there was an attempt to enforce it. There are also cases in which a condition extending beyond the limits of the Rule against Perpetuities has been held good where the question presented was whether land was subject to a valid incumbrance. Such are *Keening*

§ 309. So conditions on conveyances in fee, reserving rent giving the grantor the right on default of payment to enter, and be in as of his old estate, have been held good without any suggestion that they were too remote.¹

§ 310. This great *consensus* of authority, although without any consideration of the question involved, may perhaps be held to settle the law for the United States, and to create in this country an exception, arbitrary though it be, to the Rule against Perpetuities.

§ 310 *a*. Cases subsequent to the date of the first edition of this treatise, in which the inapplicability of the Rule against Perpetuities to conditions has been assumed *sub silentio*, have been inserted in the notes to the preceding sections, but there

v. Ayling, 126 Mass. 404; *Gibert v. Peteler*, 38 Barb. 488; 38 N. Y. 165; *Anon.*, 2 Abb. N. C. 56; *Post v. Weil*, 8 Hun, 418; *Post v. Bernheimer*, 31 Hun, 247. These cases, however, may generally be sustained on the ground that equitable easements and not true conditions were created. § 282, note, *ante*.

¹ *Wartenby v. Moran*, 3 Call, 491. *Jackson v. Demarest*, 2 Caines, 382. *Van Rensselaer v. Snyder*, 13 N. Y. 299. *Van Rensselaer v. Smith*, 27 Barb. 104. *Van Rensselaer v. Ball*, 19 N. Y. 100. *Van Rensselaer v. Slingerland*, 26 N. Y. 580. *Van Rensselaer v. Denison*, 35 N. Y. 393. *Van Rensselaer v. Barringer*, 39 N. Y. 1. *Hosford v. Ballard*, 39 How. Pr. 162; 39 N. Y. 147. *Cruger v. McLaury*, 41 N. Y. 219. See *Garrett v. Scouten*, 3 Denio, 334; *McCormick v. Connell*, 6 S. & R. 151; *Kenege v. Elliott*, 9 Watts, 258; *Robert v. Ristine*, 2 Phila. 62; *Stephenson v. Haines*, 16 Ohio St. 478; *Cadwalader, Ground Rents*, c. 8, §§ 359-372. See § 303, *ante*.

The bad results of allowing conditions to operate at remote periods of time have been alleviated, though not removed, by the strictness with which courts have construed conditions, often holding them as personal to the grantors and not passing to their heirs. *Emerson v. Simpson*, 43 N. H. 475. Page *v. Palmer*, 48 N. H. 385. *Skinner v. Shepard*, 130 Mass. 180. See also *Merrifield v. Cobleigh*, 4 Cush. 178; *Den d. Southard v. Central R. R. Co.*, 2 Dutch. 13; *Voris v. Renshaw*, 49 Ill. 425; *Hunt v. Beeson*, 18 Ind. 380; *Jeffersonville, etc. R. Co. v. Barbour*, 89 Ind. 375; *Lawe v. Hyde*, 39 Wis. 345. So in *Mitchell v. Leavitt*, 30 Conn. 587, it is said that a "restriction on the use of real estate, where it does not appear that either some individual or the public would be benefited by it, would be contrary to public policy and void." That is, a condition which does not create an easement or trust is void, — a very sensible conclusion. See *Barrie v. Smith*, 47 Mich. 130.

are a few cases in which the topic has been expressly referred to. They are as follows:

(1) *Theological Education Society v. A. G.*¹ (1883). The Court refer with approval to Bigelow, J.'s *dictum* in *Brattle Square Church v. Grant*,² distinguishing between conditions and conditional limitations as subjects for the Rule against Perpetuities. They held that the provision in question was a conditional limitation and not a condition.

(2) *Tappan's Appeal*³ (1884). Land and money were given by will to an ecclesiastical corporation on condition, and, on breach of the condition, to the testator's residuary legatees and devisees. The Supreme Court of Errors of Connecticut held that the condition was subsequent and the gift vested immediately. The Court further said that the condition did not violate the Connecticut Statutes against remoteness.⁴ As there had been no breach, this point was immaterial, but the Court assumed throughout the discussion that conditions were subject to the Rule against Perpetuities.⁵

(3) *First Universalist Society v. Boland*⁶ (1892). In this case it was said that there is in Massachusetts such a thing as a determinable fee, and that the possibility of reverter after it is not subject to the Rule against Remoteness.⁷

In the course of the discussion the Court remarks: "It has been expressly held by this Court, that such possibility of reverter upon breach of a condition subsequent is not within the Rule against Perpetuities. *Tobey v. Moore*, 130 Mass. 448. *French v. Old South Society*, 106 Mass. 479. If there is any distinction in this respect between such possibility of reverter and that which arises upon the determination of a qualified fee, it would seem to be in favor of the latter. But they should be governed by the same rule. If one is not held void for remote-

¹ 135 Mass. 285.

² 3 Gray, 142, 148. See § 305

(2), *ante*.

³ 52 Conn. 412.

⁴ See § 739, *post*.

⁵ *Qu.* Was not this the case of

a conditional limitation, and not of a condition?

⁶ 155 Mass. 171.

⁷ The correctness of this is discussed, §§ 31-41, *ante*, and § 312, and App. E, § 774, *post*.

ness, the other should not be. The very many cases cited in Gray, Rule against Perpetuities, §§ 305, 312, show conclusively that the general understanding of courts and of the profession in America has been that the rule as to remoteness does not apply; though the learned author thinks this view erroneous in principle."

(4) *Palmer v. Union Bank*¹ (1892). Bank stock was bequeathed to trustees on a charitable trust, with a proviso that if the trustees fail to carry out the trust, "this bequest shall thenceforth cease and determine, and said stock and the dividends or profits arising therefrom shall thereupon descend to and vest in my heirs at law." The court held that "heirs at law" meant those who should be heirs or next of kin of the testator at the time of breach, and not those who were heirs or next of kin at his death,² and that therefore this was the case of a conditional limitation and not of a condition. The court then goes on to state and approve the distinction between conditions and conditional limitations with reference to the Rule against Perpetuities set forth by Bigelow, J., in *Brattle Square Church v. Grant*,³ and based by him on the fact that conditions can be released and conditional limitations cannot. It is indeed strange that Bigelow, J., and the learned judges who have followed him have failed to observe that a conditional limitation to a person ascertained is as releasable as a condition.

(5) *Hopkins v. Grimshaw*⁴ (1897). In this case it was held that if there was a failure of the trust upon which land was held, the resulting trust to the heirs of the grantor was not obnoxious to the Rule against Perpetuities.⁵ In the opinion

¹ 17 R. I. 627.

² This is against universal authority. 2 Jarm. Wills (6th Am. ed.) 981-993. Theob. Wills (5th ed.) 310-313. Hawkins, Wills (2d ed.) 125. The court cites Swinburne, Petitioner, 16 R. I. 208, in support of its decision, but in that

case the gift was to "my *then* living heirs," which makes just the difference.

³ 3 Gray, 142, 148. See § 305 (2), *ante*.

⁴ 165 U. S. 342, 356.

⁵ See § 327, *post*.

the Court said: "Even when the first gift is strictly upon condition subsequent, requiring an entry on the part of the grantor or deviser, or his heirs, to revest the estate in him or them, the American Courts have treated their title as unaffected by the Rule against Perpetuities," citing the preceding sections of this book.

(6) *Wakefield v. Van Tassell*¹ (1903). It was here held that a condition not to build a grain elevator did not violate the spirit of the Rule against Perpetuities.

§ 311. In *Giles v. Boston Society*² property was given to the defendant on condition that it should keep the testator's tomb in repair. The Court held that on the facts there had been no breach of the condition, but they say: "It may well be doubted whether this condition to maintain a private tomb or burial-place was not void as tending to create a perpetuity." If these words of condition are to be held as imposing a trust,³ then the authorities cited by the Court are strong to show that such a trust is void;⁴ but if the words are not held to impose a trust, but simply to impose a common-law condition, such condition seems no more obnoxious to the Rule against Perpetuities than any other would be; and if conditions generally are exempt from the operation of the Rule, this ought to be also. The same remarks apply to *Piper v. Moulton*⁵ and *Coit v. Comstock*.⁶

§ 311 *a*. The case of *In re Tyler*⁷ confirms the correctness of the view which was taken in the preceding section. There a fund was bequeathed to a charity on condition that it kept the testator's vault in repair; upon breach of the condition the fund to go to another charity. In England it has been held

¹ 202 Ill. 41, 49.

² 10 Allen, 355.

³ See § 282, *ante*.

⁴ And see *In re Waldron*, 109 N. Y. Suppl. 681. 2 Perry, Trusts (6th ed.) § 706. But see *Jones v. Habersham*, 107 U. S. 174, 183,

184; *Smart v. Durham*, 77 N. H. 56.

⁵ 72 Me. 155.

⁶ 51 Conn. 352. See also *Hunt v. Wright*, 47 N. H. 396; § 305 (5), *ante*.

⁷ [1891] 3 Ch. D. 252. See §§ 603 *c*, 603 *d*, *post*.

that a gift from one charity to another on a remote contingency is not within the Rule against Perpetuities, and consequently the Court of Appeals (affirming the decision of Stirling, J.) held that the condition in this case was good. As Lindley, L. J., said, "There is nothing illegal in keeping up a tomb."¹ So in those jurisdictions in America in which conditions are held to be not within the Rule against Perpetuities, there is no reason why a condition to keep a tomb in repair should not be held valid. "There is nothing illegal in keeping up a tomb."

§ 312. (4) *Possibilities of Reverter*. — Possibilities of reverter after determinable fees were probably put an end to by the Statute *Quia Emptores*.² Where the Statute *Quia Emptores* is not in force, and tenure exists, i. e. in South Carolina and, perhaps, Pennsylvania,³ such interests can be created unless they be too remote; so also they have been allowed in some other States.⁴ It would seem they are not too remote.⁵ It is true that such rights are not like rights of escheat, which in no degree affect the value of the estates which are subject to them, and which in no way hamper the transfer of such estates,⁶ and that they are of a most objectionable character as restraining the free commerce in land; but this arises from the fundamental error of allowing determinable fees at all. When these are once allowed to exist, remote possibilities of reverter become a necessity.⁷

§ 313. At any rate the possibility of reverter as it exists

¹ And see *Roche v. M'Dermott*, [1901] 1 I. R. 394.

² See § 31 *et seq.*, *ante*.

³ §§ 26, 27, *ante*.

⁴ See §§ 40, 41 *a*, 115 *a*, *ante*, 603 *i*, *post*.

⁵ So held in *Lougheed v. Dykeman Baptist Church*, 40 N. Y. Suppl. 586.

⁶ See §§ 204, 205, *ante*.

⁷ The Supreme Judicial Court of Massachusetts in *First Universalist Society v. Boland*, 155 Mass.

171, has said that rights of entry for breach of condition and possibilities of reverter "should be governed by the same rule. If one is not held void for remoteness, the other should not be," and therefore that as rights of entry are not in America deemed subject to the Rule against Perpetuities, possibilities of reverter ought not to be. But it is respectfully submitted that the cases rest on totally different grounds. An entry for con-

after that form of a determinable fee known as a conditional fee, — that is, an estate to a man and the heirs of his body, as it existed at common law before the Statute *De Donis*, and as it still exists in South Carolina,¹ — can never be too remote; for if the grantee has no issue, the estate terminates with his life; and if he has issue born to whom the estate descends, the estate can be at any time alienated, and the possibility of reverter destroyed.²

§ 313 *a*. (5) *Curtesy and Dower* share the fate as to remoteness, of the estates to which they are incident.

§ 314. (6) *Rights less than ownership in land of others*, such as profits, easements, rents, could be granted at common law *de novo* to begin *in futuro*.³ These rights were probably seldom granted to begin at any distant date, and no objection on

dition broken cuts short an existing estate which, but for the entry, would continue. It has precisely the same effect as a conditional limitation, and the error in the American doctrine is to make a difference in the matter of remoteness, according as the divesting condition is in favor of a third person, or is in favor of the grantor, when in truth there is no rational distinction in the cases. But the possibility of reverter does not cut short the preceding interest. If there be an error in the Massachusetts decision of *First Universalist Society v. Boland*, as it is submitted there is, it is not in failing to apply the Rule to possibilities of reverter, but in recognizing determinable fees, which render such possibilities necessary.

A different, and, it is thought, a more correct view, of the application of the Rule against Perpetuities to possibilities of reverter is taken in this edition than in the first one.

The possibility of reverter which is held to exist in Illinois, and perhaps in some other States, upon a statutory dedication (see § 42, *ante*), has never been objected to as too remote. Probably if the question was made, the statutory character of the interest would be considered to save it. Under a common-law dedication the fee continues in the dedicator, and the abandonment of the public use no more raises a question of remoteness, than does the extinguishment of an easement. The Rule of Perpetuities is concerned with the beginning only and not with the termination of estates and interests. See § 279, *ante*. Cf. §§ 973, 974, *post*.

¹ § 44, *ante*.

² See *Jones v. Postell*, Harp. 92, 99, 100, note. On executory devises after fees simple conditional, see § 14, *ante*, and § 455, *post*.

³ § 16, *ante*.

account of remoteness seems to have been taken to them in early times, any more than to contingent remainders or to conditions. It is not improbable that a common-law grant to a person not *in esse* is void, and that therefore no such grant could be made except to a living person;¹ but a grant to A. and his heirs of a profit to begin fifty years or a thousand years from the date of the deed is good, unless it violates the Rule against Perpetuities.

§ 315. The only reasons given for exempting such a right so granted from the operation of the Rule against Perpetuities are that a grant is a common-law conveyance, and that the right is releasable. Neither of these is a valid reason.² So remote a right is greatly against public policy. If created by will it would be an executory devise void for remoteness; and such a distinction between a common-law grant and a devise is, to say the least, undesirable.

§ 316. In *Gilbertson v. Richards*,³ it was held that a rent to begin at a possibly distant day was good; but no question was raised as to the effect of a common-law grant, for the rent in that case was created by way of use, and the case cannot now be considered as law.⁴ The Real Property Commissioners in their Third Report⁵ seem to have considered that grants of incorporeal hereditaments were not within the Rule against Perpetuities, although they ought to be. But the leading text-writers all agree that they are within the Rule.⁶ Rents in-

¹ Perk. Grant, 52.

² See §§ 296-298, 302, 312, *ante*; §§ 319, 321, 323, *post*.

³ 4 H. & N. 277.

⁴ As to *Gilbertson v. Richards*, see §§ 271-273 *a, ante*, and *London & S. W. R. Co. v. Gomm*, 20 Ch. D. 562; § 275, *ante*.

⁵ P. 36.

⁶ Lewis, *Perp.* c. 29. Gilbert, *Rents*, 59, 60. Fearne, C. R. 529, Butler's note. Gilbert, *Uses* (Sugd. ed.) 195, *note*. 1 Sand. *Uses* (5th

ed.) 203-305. Sanders indeed, *loc. cit.*, refers to *Hartopp v. Carbery*, in the King's Bench in Ireland, as deciding the point; but in that case, which is not reported, the rent seems from his statement to have been created by executory devise. In *Hope v. Gloucester*, 7 De G. M. & G. 647, a covenant to grant leases at remote periods was held invalid as creating a perpetuity. And see as to leaseholds *in futuro*, § 319, *post*.

deed, although incorporeal hereditaments in the contemplation of the common law, may be perhaps fairly considered as obligations, and therefore their creation as not within the scope of the Rule against Perpetuities; the only right in any property given by a rent is a right to distrain, and this is matter of remedy to which the Rule does not apply.¹ But grants of profits or easements *in futuro* seem to give true rights in property, and should therefore be subjected to the Rule.²

§ 316 *a.* (7) *Escheat* has no effect on the tying up of property and is not subject to the Rule against Perpetuities.³

§ 317. (8) *Shifting and springing uses and executory devises* are all, without question, subject to the Rule against Perpetuities.

§ 318. *Copyholds*. — There appear to be no cases concerning remoteness in limitations of copyholds. But so far as future

¹ See § 273 *a*, *ante*; § 329, *post*.

² *South Eastern R. Co. v. Associated Portland Cement Manuf.*, [1910] 1 Ch. (C. A.) 12, 27. *Per Farwell, L. J.*, "I see no reason to doubt the accuracy of that passage [in *Lewis on Perpetuities*, pp. 619, 620, that the Rule against Perpetuities applies to easements] in the case of a right against real estate." So *Sharpe v. Durrant*, 55 Sol. J. 423. See 11 *Enc. Laws of Eng.* (2d ed.) 72, 73; 54 Sol. J. 471, 501, 502.

In *Ardley v. Guardians of the Poor*, 39 L. J. Ch. 871, T. demised land for ninety-five years to R., reserving to T. and his heirs a right of way over the east side of the demised premises during the time they should hold the adjoining land, with liberty to erect scaffolding thereon for repairing and building, and after he or they should dispose of the adjoining land, then

reserving to T., his heirs and assigns, a right of ingress and egress unto and upon the said eastern part of the demised premises for the purpose of rebuilding or repairing any buildings on said adjoining land. T. disposed of the adjoining land. Lord Romilly, M. R., held that when T. alienated the adjoining land, the first easement came to an end, and the second came into existence. No objection to the second easement on the ground of remoteness was made, but it seems to have been invalid on that score, unless it can be said that the new easement was merely a retention of part of the old easement. Perhaps in view of the fact that the first easement was reserved to T. and his heirs, and the latter to T., his heirs and assigns, this position might be difficult to maintain.

³ See §§ 204, 205, note, *ante*.

limitations of copyholds are allowed,¹ they would seem to be subject to the same rules as the corresponding limitations of freehold.²

B. PERSONAL PROPERTY.

§ 319. Chattels real may be created, and chattels real and personal transferred, *in futuro*.³ Unless the Rule against Perpetuities applies to them, they may be created or transferred fifty or a thousand years from the date of the instrument creating or transferring them. The same considerations show that the Rule should govern them as show that it should govern incorporeal hereditaments.⁴

§ 320. Whether future interests in a chattel remaining in the grantor, or limited over to a third person, after a present gift are within the Rule against Perpetuities or not depends upon whether they are to be deemed vested or contingent.⁵ All such interests, if contingent, are within the Rule.⁶

¹ See § 70, *ante*.

² Surrenders to future uses, if allowed, which is doubtful, give common-law interests; but it is highly improbable that they would be exempted from the operation of the Rule against Perpetuities on this ground. §§ 296-298, 300-302, 312, 315, 316, *ante*; §§ 319, 321, 323, *post*.

³ §§ 71, 72, 77, *ante*.

⁴ §§ 315, 316, *ante*. See also §§ 296, 298, 300-302, 312, *ante*; §§ 321, 323, *post*.

⁵ This matter is discussed in Chap. III., Vested and Contingent Interests, § 117 *et seq.*, *ante*; App. F, §§ 789 *et seq.*, *post*.

(1) If a term for 100 years is created, and then at the same time, or later, another term is granted to begin on the termination of the

first term, the latter is vested, though the reversion is not granted by it. It is ready to come into possession whenever the first term determines. The *interesse termini* is treated like an estate. See Bowen, J., in *Gillard v. Cheshire Lines Committee*, 32 W. R. 943. "When that demise was made to the plaintiff he had vested in him an interest known to the law as an *interesse termini*. That is more than a right of entry; it is an interest which the law recognizes in a future term coupled with a right to complete that interest by possession." (2) If the second term is granted on a contingency which is too remote, then the second term is not good. (3) If there is no preceding term, and the period at which the term is to begin, though

* On covenants to renew leases see §§ 230 *et seq.*, *ante*.

§ 321. As there are no true contingent remainders of personality, no such question as has been discussed with regard to contingent remainders¹ can arise on limitations of personality.²

§ 321 *a*. As the exemption in America from the Rule against Perpetuities of conditions attached to conveyances of real estate is arbitrary,³ it is impossible to say whether the exemption will be extended to conditions in conveyances of personality. In *Palmer v. Union Bank*,⁴ there is a *dictum* so extending it.

§ 321 *b*. Nothing, as has been remarked, shows more conclusively the falsity of the idea that the Rule against Perpetuities governs only interests arising under the Statutes of Uses and Wills, and does not touch common-law interests, than its application to executory limitations of chattels. Such limitations can be made in England by will, and in America they can be made by either deed or will. They do not owe their existence to the Statute of Uses, for that Statute concerns only freeholds; nor to the Statute of Wills, for chattels could be disposed of by will before that Statute. They are purely common-law interests. Yet no one questions that they are subject to the Rule. Indeed, the Rule had its origin and development in cases concerning executory devises of leaseholds.⁵

certain, is too remote, it is not good. In *Redington v. Brown*, 32 L. R. Ir. 347, (1) is said to be clearly law, and (2) is decided. *Smith v. Day*, 2 M. & W. 684; *Murphy v. Hurlstone*, 185; 6 L. J. N. s. Exch. 219; and *Knight v. City of London Brewery Co.*, [1912] 1 K. B. 10, come within (1) even if the question of remoteness, which was not suggested in either case by court or counsel, was material, which it would seem not to have been. (3) Seems correct; see § 201 *ante*; but see 30 Law Quart. Rev. 66. Cf. 1 Jarm. Wills (6th ed.) 307; Wms. Vend. & P. (2d ed.) 372;

11 Enc. Laws of Eng. 72, 73; 50 Sol. J. 760; 22 "Laws of England," § 659. §§ 117, 210, *ante*.

¹ §§ 284-298, *ante*.

² *In re Bowles*, [1902] 2 Ch. 650. And see § 325, *post*.

³ §§ 304-310, *ante*.

⁴ § 17 R. I. 627. See § 310 *a* (4), *ante*.

⁵ §§ 148-158, 160-169, 296-298, 300-302, 312, 315, 316, 319, *ante*; § 323, *post*.

On the doctrine of conversion as affecting questions of remoteness, see the case of *Rous v. Jackson*, App. I, §§ 909 *et seq.*, *post*.

II. EQUITABLE INTERESTS.

§ 322. Vested equitable interests, either of realty or personality, are not subject to the Rule against Perpetuities.¹

§ 323. All future equitable interests, not vested, are subject to the Rule against Perpetuities. This is not questioned, and it furnishes another proof that the Rule is not confined in its scope to interests arising under the Statutes of Uses and Wills, for equitable interests created both *inter vivos* and by will existed before those Statutes.²

§ 324. As no equitable future interest requires a previous estate to support it, there is no such distinction as exists at common law between contingent remainders and executory limitations. There are strictly no equitable remainders, and there can be no question in equity, such as there may be at law, whether contingent remainders are within the Rule against Perpetuities or not.³

§ 325. A curious result of the fact that there are no remainders in equity is that a limitation may be too remote in equity which would be good at law. Thus, suppose an estate is devised to A. for life, and on his death to such of his children as reach twenty-five. The limitation to A.'s children is a contingent remainder, and is not too remote. It is true that A.'s children may not reach twenty-five until more than twenty-one years after his death; but unless they have reached twenty-five at A.'s death they will never take at all, apart from any question of remoteness. The remainder, if it ever vests, must vest at A.'s death, and can therefore never be too remote. Suppose, on the other hand, that land is given to trustees in trust to pay the rents to A. during his life, and on his death to convey the land to such of A.'s children as reach twenty-five. This limitation to the children, being equitable, is not a remainder, and is too remote. For A.'s children may not reach

¹ Rhodes's Estate, 147 Pa. 227.

² Cf. §§ 296-298, 300-302, 312, 315, 316, 319, 321, *ante*.

³ See §§ 284-298, *ante*. Cf. 20 Law Quart. Rev. 285; 21 Law Quart. Rev. 126, 265.

twenty-five until more than twenty-one years after his death; and, apart from the question of remoteness, they can take whenever they reach that age, although A. may have died more than twenty-one years before.¹

§ 325 *a*. The doctrine laid down in *Whitby v. Mitchell*,² that a remainder to the children of an unborn person, after a life estate to such person, is void, apart from the Rule against Perpetuities has been extended to an equitable limitation, which if it were legal, would be a contingent remainder. *In re Nash*.³ This seems the logical result of *Whitby v. Mitchell*. Equitable limitations should follow legal limitations, unless, as in the instance in the preceding section, the doctrine of seisin is concerned in the result.⁴

§ 326. Future equitable interests in chattels which, if legal limitations of realty, would be contingent remainders are, of

¹ *Abbiss v. Burney*, 17 Ch. D. 211, by the Court of Appeal, overruling *Malins, V. C.* (whose decision had been much criticised, 69 L. T. 335; 70 L. T. 146; 24 Sol. J. 816; 25 Sol. J. 717). See *Blagrove v. Hancock*, 16 Sim. 371; *Bull v. Pritchard*, 5 Hare, 567; *Lewis, Perp.* 424, 425; 3 Dav. Prec. Conv. (3d ed.) 338-340. In *Abbiss v. Burney*, two of the judges of the Court of Appeal, it is true, thought there was no particular equitable estate preceding the estate over, which was held too remote; but they all agreed that had there been, the (so-called) equitable remainder would have been too remote. See *Marsden, Perp.* 167 *et seq.*

Vice-Chancellor Malins rested his decision largely upon Lord Hardwicke's opinion in *Hopkins v. Hopkins*, West, 606. Lord Hardwicke, indeed, in that case discussed the question whether a future equitable interest was a contingent re-

mainder or an executory devise, and held it to be a contingent remainder; but he then went on to say that an equitable contingent remainder wanted the essential characteristic of a legal contingent remainder, viz. the need of a freehold to support it. Now it is this very characteristic which requires a legal remainder to vest, if at all, at the termination of a life estate. Lord Hardwicke's judgment therefore amounts to this: that the limitation in question, if legal, would be a contingent remainder, but that in equitable estates there is no difference between contingent remainders and executory devises. But see *Marsden, Perp.* 169, note.

² 44 Ch. D. 85. See §§ 298 *a*, *et seq.*, *ante*.

³ [1909] 2 Ch. 450; [1910] 1 Ch. (C. A.) 1.

⁴ See 1 Jarm. Wills (6th ed.) 286.

course, executory interests, require no preceding interest to support them, and are subject to the Rule against Perpetuities.¹ Even Vice-Chancellor Malins, in attempting to lay down a different doctrine as to (so-called) equitable contingent remainders in realty, does not pretend that any limitations of personalty can have the peculiar characteristics of legal contingent remainders.²

§ 327. As possibilities of reverter are purely legal interests, the question above discussed³ as to the exemption of such rights from the Rule against Perpetuities cannot arise in considering equitable interests. But equitable interests analogous to possibilities of reverter may exist in connection with certain charitable trusts.

§ 327 *a*. Trusts may result either: (1) Because the express trusts created do not exhaust the equitable fee, as when only equitable life estates or equitable estates tail are created. Here the resulting trust is a vested interest, like a reversion. It is ready to take effect whenever and however the preceding estates determine. (2) Because the *cestui que trust* dies without heirs. If there is a resulting trust in such a case,⁴ such resulting trust is an interest in the nature of an escheat and not within the Rule. (3) Because property has been given for a charitable purpose and that purpose has been accomplished. Equitable determinable fees ought not to have been allowed any more than legal determinable fees. We shall see,⁵ however, that determinable charitable trusts have been allowed. Wherever such a trust is allowed, there must be *ex necessitate rei*, a valid resulting trust, and therefore a trust which is not avoided by the Rule against Perpetuities.

§ 328. In the case of a charitable trust there is generally no defined *cestui que trust*, but this undefined interest is subject

¹ Bull *v.* Pritchard, 1 Russ. 213.
Wms. Pers. Prop. (17th ed.) 404,
405.

² Abbiss *v.* Burney, 17 Ch. D.
211, 221, 223.

³ §§ 312, 313, *ante*.

⁴ As to whether there is a resulting trust in such a case, see § 205, note, *ante*.

⁵ See § 603 *i, post*.

to the Rule against Perpetuities, and cannot begin at too remote a period.¹ But although a charitable trust is to begin at a remote period, yet if it is preceded by another charitable trust, it has been held not to be void, even if there be a change of the trustee. This is considered in the chapter on Charitable Trusts.²

III. CONTRACTS.

§ 329. The Rule against Perpetuities concerns rights of property only, and does not affect the making of contracts which do not create rights of property. Thus a promise to A. to pay him or his executors or administrators a sum of money on a future event is good, although such event may not happen within twenty-one years after lives in being;³ and this is not altered by the fact that the covenant runs with the land (as, for instance, a covenant of warranty), or can, in any way, be enforced by or against other persons than the original parties

¹ §§ 595, 596, *post*.

² §§ 597-603, *post*.

³ See *Walsh v. Secretary of State for India*, 10 H. L. C. 367; *Witham v. Vane*, in Dom. Proc., Challis, Real Prop. (3d ed.) 440, 451, 452; *Marsden, Perp.* 25, 26; Challis, Real Prop. (3d ed.) 184. See § 693, *post*. Although the Rule does not affect the creation of such a contract, it does apply to a transfer of the contract when created. Thus if the promisee in such a contract should bequeath it to A. on a remote contingency, the bequest would be void. The creation of an obligation is no part of the law of property; but the transfer of such obligation when created is as much part of the law of property as the transfer of a house or of a table. The attempt of North, J., to support his decision in *In re Randell*, 38 Ch. D. 213, on *Walsh v. Secretary of State for India* is

not happy. In the last-mentioned case there was no trust fund. In the former there was. In *Borland's Trustee v. Steel Brothers & Co.*, [1901] 1 Ch. 279, a company's articles of association provided that a shareholder should, upon demand, transfer his shares upon certain terms and to certain persons. Farwell, J., held that this proviso was not too remote because it was a personal contract. *Sed quære*. The right of the shareholder had its origin, it is true, in a personal contract, but when once created the transfer of that contract right would seem to be subject to the Rule against Perpetuities. If, as is often the case with such articles, the shares have to be surrendered on the death of the shareholder, he has only a life interest, and such proviso will not be too remote. Cf. *A. G. v. Jameson*, [1904] 2 I. R. 644; [1905] 2 I. R. 218.

and their representatives,¹ nor that the obligation has a right of distraint attached to it, for that is only matter of remedy, and not a future limitation of any particular property.²

§ 330. Where, however, a contract raises an equitable right in property which the obligee can enforce in chancery by a decree for specific performance, such equitable right is subject to the Rule against Perpetuities. This was decided by the Court of Appeal in *London & South Western R. Co. v. Gomm*,³ where an option to purchase land, unlimited as to time, was held void; overruling *Birmingham Canal Co. v. Cartwright*.⁴

§ 330 *a*. But though an equitable right in property under such a contract is subject to the Rule against Perpetuities, that Rule is no bar to an action at law on the contract for damages.⁵

§ 330 *b*. In *South Eastern R. Co. v. Associated Portland Cement Manuf.*,⁶ a railroad company, being about to purchase a strip through C.'s land, agreed with C., in a writing not under seal, that C., his heirs and assigns, might at any time make a tunnel under the strip. Subsequently C., by a

¹ See *Aspden v. Seddon*, 1 Ex. D. 496; *Morgan v. Davey*, 1 Cab. & El. 114; § 273 *a*, *ante*. But the fact that a covenant runs with the land does not necessarily prevent it from conflicting with the Rule against Perpetuities, if it creates a right of property. § 330. See remarks of Warrington, J., in *Woodall v. Clifton*, [1905] 2 Ch. 257, 264; and 49 Sol. J. 740.

² See §§ 273 *a*, 316, *ante*.

³ 20 Ch. D. 562.

⁴ 11 Ch. D. 421. See § 275, *ante*, and cases there cited; *Marsden*, Perp. 14; *Challis*, Real Prop. (3d ed.) 183 *et seq.*; and on the application of the Rule against Perpetuities to trusts for the payment of debts, see §§ 415 *et seq.*, *post*; and to mortgages and sinking funds, see Chap. XVI., *post*.

On the application of the Rule to covenants of renewal in leases, see § 230 *et seq.*, *ante*.

On the question whether a direction to pay premiums on a policy of life insurance violates the *Thellusson Act*, see § 693, *post*.

⁵ *Worthing Corporation v. Heather*, [1906] 2 Ch. 532. See *South Eastern R. Co. v. Associated Portland Cement Manuf.*, [1910] 1 Ch. 12. Mr. T. Cyprian Williams in two articles, 51 Sol. J. 648, 669, contends that, though the contract in *Worthing Corporation v. Heather* did not come within the Rule against Perpetuities, it should have been held void as an illegal restraint on alienation. See 54 Sol. J. 502.

⁶ [1910] 1 Ch. 12.

deed poll, conveyed the strip to the railroad company, reserving to himself, his heirs and assigns, the right to make the tunnel. The assignee of C. started to make the tunnel, and the railroad company applied for an injunction. The deed from C., being a deed poll, created no legal easement in his favor,¹ but the agreement gave him an equitable right to an easement. The question was whether this was a present right or a future right. Swinfen Eady, J., held that it was a present right, and therefore was not obnoxious to the Rule against Perpetuities,² and so he refused the injunction. This, it is submitted, was correct.³

§ 330 c. The case was carried to the Court of Appeals (Cozens-Hardy, M. R., Fletcher, Moulton, and Farwell, L.JJ.).⁴ The Court affirmed the decree below refusing the injunction, but apparently not on the ground taken by Swinfen Eady, J. They said that the agreement between C. and the railroad company was a contract which could be enforced against the railroad company, and that specific performance of this contract could be compelled. Undoubtedly the contract created an obligation on the part of the company which could be enforced by a suit at law, because, *qua* contract, it was not subject to the Rule against Perpetuities, but it does not follow

¹ By an anomalous, but widely spread doctrine, in the United States, such a provision is held to create a legal easement.

² See § 279, *ante*.

³ But see 54 Sol. J. 471.

⁴ The learned judges seem to have decided the case *quasi in furore*. "I have listened with some amazement to the contention that the rule of perpetuities applies where the action is brought, not against an assignee of the covenantor, but against the covenantor himself, and I have listened with still more amazement when I heard the case of London & South Western

R. Co. v. Gomm, 20 Ch. D. 562, cited as an authority for that purpose." [1910] 1 Ch. 28. "I do not think that in my whole experience I have ever had to decide upon a more utterly unmeritorious claim." (Ib. 31.) "If they were right in law, the fact that I am thoroughly disgusted with the railway company for putting forward such a claim would not affect me in the slightest . . . but the law on which the claim is founded seems to be as bad as the morals." (Ib. 32.) "There is certainly no honesty in the company's case." (Ib. 34.)

that it could be enforced by a decree for specific performance; for to have a right to specific performance of a contract to convey an interest in land is to have a right of property in the land which is subject to the Rule against Perpetuities. With the greatest respect for the eminent judges, it does seem that, in their disgust for the conduct of the railroad company, they overlooked this distinction.¹ *South Eastern R. Co. v. Associated Portland Cement Manuf.* was followed by Warrington, J., in *Sharpe v. Durrant*.²

¹ See a criticism on this case by Mr. T. Cyprian Williams, 54 Sol. J. 471, 501.

² 55 Sol. J. (1911) 423.

CHAPTER IX.

SEPARABLE LIMITATIONS.

§ 331. VERY often, indeed generally, a future contingency which is too remote may in fact happen within the limits prescribed by the Rule against Perpetuities, and a gift conditioned on such contingency may be put into one of two classes according as the contingency happens or does not happen within those limits; but unless this division into classes is made by the donor, the law will not make it for him, and the gift will be bad altogether. Thus if land is devised to A. and his heirs, with a gift over on the tenant for the time being changing the family name, such gift might be divided into two: one, a gift if A. or any of his heirs born in the lifetime of the testator should change the name; and the other a gift if any of the heirs of A. not born in the lifetime of the testator should change the name. The former gift would be good, the latter bad. The testator might have separated the gifts, but as he has not, A.'s estate is indefeasible.

§ 332. This is the law even when the division is of the most obvious character. Thus a gift to B. if no child of A. reaches twenty-five is bad, although A. dies without children; while if the gift over had been if A. dies without children, or if his children all die under twenty-five, then on A.'s death without children, the gift over would have taken effect.

§ 333. A leading case in which this principle was strikingly enforced is *Proctor v. Bishop of Bath and Wells*¹ (1794). There was in that case a devise in fee to the first or other son of A. that should be bred a clergyman and be in holy orders; but in case A. should have no such son, then to B. in fee. A.

¹ 2 H. Bl. 358.

died without ever having had any son. It was held that the gift to B. was void.¹

§ 334. Two earlier cases are not to be reconciled with this doctrine, *Taylor v. Biddal*² and *Trafford v. Trafford*.³ No objection of remoteness was raised in either of them, and it is now universally admitted that they were wrongly decided.⁴ In *Ibbetson v. Ibbetson*⁵ a testator devised land to A. for life, remainder to A.'s first and other sons successively in tail male, with remainders over; and he bequeathed chattels to trustees in trust to permit the same to be used and enjoyed by the person and persons who for the time being should be entitled to the possession of said land by virtue of the limitations in the will, until a tenant in tail of the age of twenty-one years should be in possession of said land, and then the chattels were to go and belong to such tenant in tail. On A.'s death this eldest son had reached twenty-one years. It was held by Shadwell, V. C., and affirmed by Lord Cottenham, C., that the gift of the chattels to the first tenant in tail who reached twenty-one was void for remoteness, and that on A.'s death the chattels fell into the testator's residuary estate.⁶

§ 335. In *Smith v. Dungannon*⁷ a testator bequeathed personal property to trustees in trust to permit A. to take the

¹ Lewis, Perp. 464-466, 506-509. Marsden, Perp. 73. See *Cattlin v. Brown*, 11 Hare, 372, 376.

² 2 Mod. 289; Freem. K. B. 243; § 172, *ante*.

³ 3 Atk. 347.

⁴ *Lincoln v. Newcastle*, 12 Ves. 218, 231-233. *Dungannon v. Smith*, 12 Cl. & F. 546, 565, 580, 592, 598, 608, 616-619, 627, 631, 632. Lewis, Perp. 652-654; Suppl. 21, 22. See *Rowland v. Morgan*, 6 Hare, 463, 470.

⁵ 10 Sim. 495; 5 Myl. & Cr. 26.

⁶ This case was commented on, rather adversely, by Mr. Lewis, Perp. 649, 652; but the learned

author, in his remarks on *Smith v. Dungannon*, seems to have changed his opinion. Lewis, Perp. Suppl. 159-161.

As the tenant in tail had reached twenty-one at the death of A., the gift until such tenant in tail reached twenty-one did not take effect; and there was no occasion to consider its validity. See Chap. XI., *post*.

⁷ Fla. & K. 638; 5 Ir. Eq. 84; 1 Dr. & W. 543, note; *sub nom.* *Dungannon v. Smith*, 12 Cl. & F. 546. See *Ker v. Dungannon*, 1 Dr. & W. 509; 1 Conn. & L. 335; 4 Ir. Eq. 343; and Sugd. Law Prop. 342-

profits for life, and on his death to permit the person who for the time being would take by descent as heir male of the body of A. to take the profits until some such person should reach twenty-one, and then to convey the same to such person. A. died leaving a son over twenty-one years of age. The question came first before Lord Plunket, Lord Chancellor of Ireland, in *Ker v. Dungannon*, who held that the limitation to the heir male of the body of A. who should reach twenty-one was void for remoteness;¹ but he recommended a rehearing before his successor, Sir E. B. Sugden, who decided the case on another ground, but expressed a strong opinion that the limitation was too remote.

§ 336. The case of *Smith v. Dungannon*, which raised distinctly the question of remoteness, was then brought before Sir Michael O'Loughlen, M. R., who decided that the limitation was void. An appeal was then taken to Lord Chancellor Sugden, but he, owing to his having expressed his opinion in *Ker v. Dungannon*, suggested that an appeal should be taken at once to the House of Lords. This was done. The judges were summoned, and Tindal, C. J., Patteson, Williams, Coleridge, Coltman, Maule, Wightman, and Cresswell, JJ., and Parke, Alderson, Rolfe, and Platt, BB., attended, and all but Coleridge, J., delivered opinions. Nine — Tindal, C. J., Williams, Coltman, Maule, Wightman, and Cresswell, JJ., and Alderson, Rolfe, and Platt, BB. — thought the limitation too remote. Two — Patteson, J., and Parke, B. — thought it, in the circumstances which had happened, good. All the law lords present — Lords Lyndhurst, C., Brougham, Cottenham, and Campbell — agreed with the majority of the judges that it was bad for remoteness.

§ 337. The two eminent judges who thought that A.'s son should take based their opinion on the fact of the gift during minority. They thought the gift during minority and the

349; Lewis, *Perp. Suppl.* 159-161; Marsden, *Perp.* 113-115. Cf. *In re Fane*, [1913] 1 Ch. (C. A.) 404.

¹ See 12 Cl. & F. 559, note (d).

gift on reaching twenty-one should be taken together and made a gift to a series, the first of whom would certainly take within the limits of the Rule against Perpetuities. They conceded that if the gift on reaching majority had stood alone, without the gift during minority, it would have been bad.¹

§ 338. To the rule that a gift cannot be divided when the settlor or testator has not divided it there is an exception. When a gift over would, apart from the Rule against Perpetuities, take effect under certain circumstances as a remainder and under other circumstances as an executory devise, and in case it took effect as a remainder would not be obnoxious to the Rule, then, if in fact it does take effect as a remainder, it will be good, although, had it taken effect as an executory devise, it might have done so at too remote a period. This exception was established by the case of *Evers v. Challis*.² In that case there was a devise of land to A. for life, and on her death to "such of her children as she may have, if a son or sons, who shall live to the age of twenty-three years, and, if a daughter or daughters, who shall live to the age of twenty-one years;" and in case of the death of A. without leaving a child, if a son, who should attain twenty-three, or, if a daughter, who should attain twenty-one, there was a devise over. A. died without ever having had any children. It was held³ that in the event which had happened, apart from the Rule against Perpetuities, the devise over would take effect as a remainder. The Court of Queen's Bench⁴ (Campbell, C. J., Coleridge, Wightman, and Erle, JJ.) held that the gift over was not bad for remoteness, as it had taken effect as a remainder, and could not have taken effect as a remainder except at the death of A.

¹ 12 Cl. & F. 590, 601, 602. Whether the gift during minority was good, and if so, to what extent, see Chap. XI., *post*.

In addition to the above cases see, as bearing on the separableness of limitations, *Commissioners v. De Clifford*, 1 Dr. & W. 245; *Re*

Roberts, 19 Ch. D. 520; *Smithwick v. Hayden*, 19 L. R. Ir. 490.

² 18 Q. B. 224, 231; 7 H. L. C. 531.

³ Following *Gulliver v. Wickett*, 1 Wils. 505.

⁴ *Sub nom.* *Doe d. Evers v. Challis*, 18 Q. B. 224.

The Court of Exchequer Chamber¹ (Maule, Williams, and Talfourd, JJ., and Platt, B.) reversed the judgment of the Court of Queen's Bench; but the House of Lords² (Lords Cranworth, Wensleydale, Chelmsford, and Brougham), in accordance with the unanimous opinion of the judges summoned (Wightman, Williams, and Crompton, JJ., Martin, Bramwell, and Watson, BB.), reversed the judgment of the Exchequer Chamber, and affirmed the judgment of the Queen's Bench.³

§ 339. *Evers v. Challis* is sometimes cited as authority for the position that when a gift over is to take effect not only on children failing to reach a remote date, but also on such children never being born, the latter will be good though the former will not, although both are included in one expression. But this is incorrect. Such an idea is inconsistent with *Proctor v. Bishop of Bath and Wells*.⁴ The reason for allowing the separation of contingencies to be made in *Evers v. Challis* was that in one event the gift would take effect as a remainder, and in the other as an executory devise. Where, in either aspect, the gift is an executory devise or bequest, *Evers v. Challis* does not apply. If, therefore, in that case the property in question had been personalty, or an equitable interest in realty, or if, as in *Proctor v. Bishop of Bath and Wells*, there had been no preceding estate at all, so that the gift over could not be a remainder, then such gift would have been wholly bad, although no children had ever been born. "Our opinion does not at all conflict

¹ 18 Q. B. 231.

² 7 H. L. C. 531.

³ A long line of cases from *Purefoy v. Rogers*, 2 Wms. Saund. 380, to *White v. Summers*, [1908] 2 Ch. 256, has established the doctrine that an estate which can take effect as a contingent remainder cannot take effect as an executory devise. See App. J, § 918, *post*. Why, in accordance with this doctrine, was not the limitation over in *Evers v. Challis* a contingent remainder and

nothing more, without regard to any question of remoteness? May it be that the doctrine of *Purefoy v. Rogers* does not cover the case where the extension to the contingency raising a contingent remainder, is by implication only? See Leake, Land Law, 370; Theob. Wills (7th ed.) 651; and the ambiguous remarks of Lord Davey in *Hancock v. Watson*, [1902] A. C. 14, 21.

⁴ 2 H. Bl. 358; § 333, *ante*.

with the authority of the cases of *Proctor v. Bishop of Bath and Wells* and *Jee v. Audley*, in neither of which cases was it possible for the limitation over to operate as a remainder.”¹ “In that case [*Proctor v. Bishop of Bath and Wells*] there was no particular estate to support the contingent remainder, and it was clearly an executory devise.”²

§ 340. Accordingly in *Thatcher's Trusts*,³ where the produce of the testator's real and personal estate was given to A. for life, and after her death in trust for such of her children as should reach twenty-five or die under that age leaving issue then living, and in case any child of A. should die under twenty-five without leaving any issue then living, then to be divided among A.'s other children, and in case no child of A. should reach twenty-five or die under that age leaving issue, then in trust for B., and A. was never married, it was held that the gift to B. was too remote. The editors of Jarman's fifth edition⁴ thought this inconsistent with *Evers v. Challis*; but the distinction is that in *Evers v. Challis* there was a legal remainder — in *Thatcher's Trusts* there were only equitable interests in personalty.

§ 340 a. In *Watson v. Young*⁵ there was a devise of land to trustees in trust for A. for life, and after his death in trust for his children who should reach twenty-one, and the issue of any child dying under twenty-one who should reach twenty-one; “but in case there should be no child, nor the issue of any child,” of A. who should live to reach twenty-one, then in trust for B. A. had no children. Pearson, J., held that the gift to B. was separable into two distinct alternate gifts: (1) In case A. had no child, and (2) in case there should be no child or issue of a child of A. who should reach twenty-one; and that the gift on the first contingency, which had in fact oc-

¹ *Per* Wightman, J., 7 H. L. C. 547.

² *Per* Lord Brougham, 7 H. L. C. 556. See 1 Jarm. Wills (5th ed.) 257, 258; Marsden, Perp. 73, 74.

³ 26 Beav. 365.

⁴ 1 Jarm. Wills (5th ed.) 258, note (n), and see *Id.* (6th ed.) 358.

⁵ 28 Ch. D. 436.

curred, was good. The learned judge took no notice of *Proctor v. Bishop of Bath and Wells*, but founded his decision solely on *Evers v. Challis*. He said: "It was urged that the decision in *Evers v. Challis* depended on the fact that it related to a contingent remainder. I cannot see that it did. For the purpose of considering whether the clause contained terms which were divisible, it was wholly immaterial whether there was a contingent remainder or not." But in face of the language of the eminent persons in *Evers v. Challis* above cited,¹ it is clear that Pearson, J., misunderstood that case, and that the decision in *Watson v. Young* was wrong.²

§ 340 *b*. And, accordingly, in *In re Bence*,³ *Watson v. Young* was overruled, and the case of *Evers v. Challis* placed, by the Court of Appeal, on the distinction between a contingent remainder and an executory devise. "The case is no authority for the proposition that every gift over may be analyzed into as many events as are included within its language, and be held good or bad as the events may happen."⁴

§ 340 *c*. And so in *In re Hancock*⁵ the Court of Appeal, affirming the order of Byrne, J., asserted in the most explicit manner that *Evers v. Challis* rested upon the distinction between a contingent remainder and an executory devise, and had no application to a bequest of personalty in trust; and on appeal to the House of Lords, *sub nom. Hancock v. Watson*, the order was affirmed on the same ground.⁶

§ 341. When the settlor or testator has himself separated the contingencies, there is no difficulty in regarding the gifts separately, and upholding one, although the other fails. And the courts naturally, and properly, lean to construing the gifts separately, when it can be done.⁷ The cases are given in the following sections.

¹ § 339, *ante*.

⁵ [1901] 1 Ch. (C. A.) 482.

² See *Stephens v. Evans*, 30 Ind. 39.

⁶ [1902] A. C., 14. See 1 Jarm. Wills (6th ed.) 358-361.

³ [1891] 3 Ch. (C. A.) 242.

⁷ Lewis, *Perp.* c. 21, pp. 501-

⁴ *Per Fry*, L. J. [1891] 3 Ch. (C. A.) 251.

510. 1 Jarm. Wills (6th ed.) 354. Marsden, *Perp.* 75-78, 81.

§ 342. *Longhead v. Phelps*.¹ In a marriage settlement, after estates for the lives of the husband and wife, a term of a thousand years was given to trustees in trust if the husband should die without leaving issue male by the marriage, or if all the issue male of the marriage should die without issue, then after the death of the survivor of the husband and wife without issue male, or in case at the death of the survivor there should be issue male, then after the death of such issue male without issue, to raise certain sums. At the death of the survivor there was no issue male. It was contended that the trust was too remote. But the Court held that under the circumstances it was good.²

§ 343. *Leake v. Robinson*.³ Real and personal property were devised to trustees in trust for A. for life, then for such of A.'s children as should reach twenty-five, then over; but in case A. should die without leaving issue living at the time of his death, or, leaving such, all should die before twenty-five, then over. It was held that if A. left children the gift over would be void, but that if he had no issue living at his death the gift would be good.

§ 344. *Monypenny v. Dering*.⁴ Land was devised to trustees in trust for P. for his life; on his death for his son for life; on such son's death for the first son of such son in tail male; in default of such issue in trust for all the other sons of P. successively for the like interests as were limited to the first son and his issue, and in default of issue of P., or in case of his not leaving any at his death, then over to T. It was held that P.'s sons did not take estates tail by *cy pres*, and consequently that the gift over in default of the issue of P. was too remote, and the question was whether the gift over in case P. had no issue living at his death (which in fact hap-

¹ 2 W. Bl. 704.

² See also *Crompe v. Barrow*, 4 Ves. 681, Mr. Lewis's criticism on which, Perp. 505, note (u), is shown,

in 1 Jarm. Wills (6th ed.) 354, note, to be incorrect.

³ 2 Mer. 363, 394.

⁴ 16 M. & W. 418; 7 Hare, 568; 2 De G. M. & G. 145.

pened) was separate, so that it could stand, although the gift on default of issue generally was too remote. The case came first before Vice-Chancellor Wigram, who sent a case for the opinion of the Court of Exchequer. They decided that the whole gift was void for remoteness;¹ but the question of the separableness of the contingencies was not argued before them on behalf of T.² The Vice-Chancellor then sent the case to the Court of Common Pleas, who were of opinion that the contingencies were separable, and that on the contingency which had happened the gift to T. was good.³ The Vice-Chancellor made a decree in favor of T.;⁴ and Lord St. Leonards, C., on appeal, affirmed the decree, holding that the contingencies were separable.⁵

§ 345. *Goring v. Howard*.⁶ Personal property was given to trustees in trust for G. for life, and after his death to his children on their reaching twenty-five, and in case G. should die without issue living at his death, then over. The gift over on G.'s dying without issue at his death was held good.

§ 346. *Attenborough v. Attenborough*.⁷ This case is discussed under Powers.⁸

§ 347. *Harding v. Nott*.⁹ A term for years was devised to R. and his executors, but if R. or his issue male should become possessed of certain other land, then there was a gift over. R. died and devised the term to his son S., who became possessed of the other land. Held, that the gift over was

¹ 16 M. & W. 436, 437.

² See 7 Hare, 584, 598.

³ See 7 Hare, 582-584. In the cases sent to the courts of common law legal estates were assumed to be in question, and therefore, according to *Evers v. Challis*, the decision of the Court of Common Pleas was right, even had the contingencies been included in one expression; for in case of the death of P. without leaving any issue living at his death, the gift over would have taken effect as a re-

mainder. But upon the real facts as they existed, and were acted upon in Chancery, the interests were equitable, and were therefore all executory devises and not strictly remainders.

⁴ 7 Hare, 597-600.

⁵ 2 De G. M. & G. 180-184.

See § 252 *et seq.*, *ante*.

⁶ 16 Sim. 395.

⁷ 1 K. & J. 296.

⁸ See § 480, *post*.

⁹ 7 E. & B. 650.

too remote. The Court said that even if the gift over on R.'s acquiring the other land could be considered as a distinct gift from the gift on his issue's acquiring it, yet here the latter gift only could take effect, and that was clearly too remote. There is nothing in the opinion intimating that the Court thought the gifts were distinct.¹

§ 348. *Cambridge v. Rous*.² Here there was a gift over on the death of C., "not leaving any child or children at the time of her death, or the death of all her children under the age of twenty-seven." C. never had any issue. Held, that the gift over took effect.

§ 349. *Miles v. Harford*.³ A testator devised freehold land to trustees to the use of R. for life, remainder to the use of R.'s first and other sons in tail male, remainder to the use of G. for life, remainder to the use of G.'s first and other sons in tail male, provided that if R. or any issue male of R. should become entitled to certain estates, and if G. or any of his issue male should be then living, then, and in that case, and so often as the same should happen, the use limited to or in trust for R., and to or in trust for his issue male, should absolutely cease. The testator also devised his leasehold land to trustees upon and for such trusts, interests, and purposes, and with, under, and subject to such powers, provisos, and directions as, regard being had to the difference in the tenure of the premises respectively, would best and most nearly correspond with the uses, trusts, powers, provisos, and directions in the will declared and contained concerning the testator's freehold estates. R. became entitled to the said certain estates. It was held by Jessel, M. R., that the gift over of the leaseholds took effect. The Master of the Rolls thought that the gift of the leaseholds was executory, and could therefore be framed so as to avoid the objection of remoteness; but he also went on to say that he thought the gift could be split in two, one on the contingency of R. getting the estates, the other on

¹ But see *Miles v. Harford*,
§ 349, *post*.

² 25 Beav. 409, 414.

³ 12 Ch. D. 691.

the contingency of the issue male of R. getting the estates, and that the former was good. The case is a strong one, but the opinion seems correct.¹

¹ See *Attenborough v. Attenborough*, 1 Kay & J. 296, and other cases cited, § 480, *post*.

The language of the learned judge in *Miles v. Harford* so well expresses the law, that it is worth quoting at length. "This only disposes of the question in one view, but there is another view, and as I take an adverse view to the defendants on this also, I think I should express my views on that. As I understand the rule of law, it is a question of expression. If you have an expression giving over an estate on one event, and that event will include another event which itself would be within the limit of perpetuities, or, as I say, the Rule against Perpetuities, you cannot split the expression so as to say if the event occurs which is within the limit the estate shall go over, although, if the event does not occur, the gift over is void for remoteness. In other words, you are bound to take the expression as you find it, and if, giving the proper interpretation to that expression, the event may transgress the limit, then the gift over is void.

"What I have said is hardly intelligible without an illustration: On a gift to A. for life, with a gift over in case he shall have no son who shall attain the age of twenty-five years, the gift over is void for remoteness. On a gift to A. for life, with a gift over if he shall have no son who shall take priest's orders in the Church of England, the gift over is void for remoteness; but a

gift superadded, 'or if he shall have no son,' is valid, and takes effect if he has no son. Yet both these events are included in the other event, because a man who has no son certainly never has a son who attains twenty-five or takes priest's orders in the Church of England, still the alternative event will take effect, because that is the expression.

"The testator, in addition to his expression of a gift over, has also expressed another gift over on another event although included in the first event, but the same judges who have held that the second gift over will take effect where it is expressed, have held that it will not take effect if it is not expressed, that is, if it is really a gift over on the death before attaining twenty-five or taking priest's orders, although, of course, it must include the case of there being no son. That is what they mean by splitting, they will not split the expression by dividing the two events, but when they find two expressions, they give effect to both of them, as if you had struck the other out of the will. That shows it is really a question of words and not an ascertainment of a general intent, because there is no doubt that the man who says that the estate is to go over if A. has no son who attains twenty-five, means it to go over if he has no son at all, it is, as I said before, because he has not expressed the events separately, and for no other reason. That is my view of the authorities. This is a question of authorities.

§ 349 *a*. In *Goodier v. Johnson*¹ a testator gave property at a period which might be more than twenty-one years after lives in being, to be divided among the children of his son and daughter, and the issue of such of them as might be then dead leaving issue, such issue to take the parent's share. It was

"Now, we come to the case we have before us. The estate is to go over if any of his sons get another estate, that is, if any one of his sons who has got possession of this estate gets one of the other estates, or if any of the issue male of the body of any of the sons gets the estate. Here you have two events expressed. He might have said, if any of the issue male of my body get the estate, which would have included both events, and then you could not have split it up; but he has not said so. He has divided it for some reason or other, probably a conveyancer's one, because it is an alteration of a conveyancer's form. The words 'sons' and 'issue male' are both added, but he has divided that and suggests two events, then and in any of the events 'and so often as the same shall happen the uses hereby limited of and concerning my freehold hereditaments to or in trust for any such younger son or whose issue male shall for the time being become entitled as aforesaid, and to or in trust for his issue male shall absolutely cease.' That is, there is a cesser of the estate either of the younger son or the issue male of the younger son. Why should I alter the words? Why should I say that the event of the younger son properly expressed succeeding to the estate being in due time is to be void for remoteness? The reason suggested to me is this, it is quite plain he

means it to go along the whole line. I agree.

"So in the case of a man dying without a son attaining twenty-five. That is not good although he means it to apply to the case of his having no son, and there is none. It is not what he means as to the event, but whether he has expressed the event on which the estate is to cease, so as to bring one alternative within the limits, and if he has chosen to say the estate is to cease first of all, as he might have said if a younger son becomes a peer or attains the age of fifty, or any other event within the limits, or any of the issue male of my younger sons shall become a peer, one gift over might be valid, he might have said if any of my issue male shall become a peer, or if the issue male of my younger son become a peer thereupon the estate shall go over, that would have been different, but I think I have no right to alter the expression. The law is purely technical. The expressions are there, and using them gives effect to the real intention. Why should I go out of my way to extend technical law to a case to which it has not hitherto been extended? It seems to me that I ought to read the expressions as I find them. The event which is expressed has happened. It is within legal limits, and I think the estate should go over." Pp. 702-705. See § 354 *a*, *post*.

¹ 18 Ch. D. 441.

held, on the strength of other provisions in the will, that this was a vested gift in the grandchildren, with a substitutionary gift over to the issue of such of them as died before the period of distribution, and that the gift to the grandchildren was good, although the substitutionary gift was too remote.

§ 349 *b*. The case of *Watson v. Young*¹ has been previously discussed.²

§ 349 *c*. *In re Harvey*.³ A testatrix who had two daughters directed that "in case both my said daughters shall die without leaving any child living at the decease of the survivor of them or of the survivor of their respective present or any future husbands, then, after the death of such of my daughters as may happen to survive the other of them, and the death of the survivor of their respective husbands" the residue of the estate was given over. Both daughters died, each leaving a husband, but no issue. It was held by the Court of Appeal (overruling *North, J.*) that the limitation could not be split, and that the gift over was too remote.

§ 349 *d*. *Hutchinson v. Tottenham*⁴ is discussed under powers.⁵

§ 349 *e*. *In re Hancock*.⁶ Bequest of personalty in trust for A. for life, and on her death in trust for her children upon attaining twenty-five, if sons, or upon attaining twenty-one, or marriage, if daughters, "but in default of such issue then over." A. died without ever having had a child. It was held by the House of Lords, affirming the decisions below, that the gift over was not separable and was too remote.

§ 350. *Attorney-General v. Wallace*.⁷ Gift by will on the death of A. without child or children, or should she not have any child alive at her death, or should her child or children die

¹ 28 Ch. D. 436.

² See § 340 *a*, *ante*.

³ 39 Ch. D. 289.

⁴ [1898] 1 I. R. 403.

⁵ § 522, note, *post*; and see

other cases under powers cited, § 480, *post*.

⁶ [1901] 1 Ch. (C. A.) 482; *sub nom.* *Hancock v. Watson*, [1902] A. C. 14.

⁷ 7 B. Monr. 611, 616.

without issue, in either event over. A. died without leaving issue at her death. Held, that the gift over took effect.

§ 351. *Armstrong v. Armstrong*.¹ Gift by will in the case of A. "departing this life without issue, or such issue dying themselves." A. died without leaving issue at his death. It was held that "departing this life without issue" meant "dying without leaving issue at death," and that the gift over took effect.

§ 352. *Ackerman v. Vreeland*.² Bequest to A. in fee, but if she died without issue, or her children died before they had issue, then over. A. died without leaving issue living at her death. Held, that the gift over took effect.

§ 353. *Jackson v. Phillips*³ and *Schettler v. Smith*,⁴ the latter a case under the New York statutes, are cases of clearly separable limitations,⁵ and so are *Perkins v. Fisher*,⁶ *Stone v. Bradlee*,⁷ *Gray v. Whittemore*,⁸ *Brown v. Wright*,⁹ *Quinlan v. Wickman*;¹⁰ and see *Hewitt v. Green*,¹¹ *Merkel v. Capone*.¹²

§ 353 a. *Donohue v. McNichol*.¹³ A devise to the executor of a will in trust to pay the income to J. for life, upon J.'s death leaving issue to pay the income to such issue for life, and on the death of such issue in trust for the testator's heirs and assigns; and in the event of J.'s dying without issue the executor to hold the property for the testator's lawful heirs. J. died without having had any issue. It is pretty clear that in the latter gift a definite failure of issue was intended, and that the gifts over on the death of J.'s issue and of J. himself were distinct. A *dictum*, therefore, that the gift over on the death of J. was bad for remoteness seems erroneous.

§ 353 b. *Seaver v. Fitzgerald*.¹⁴ A testator gave the residue of

¹ 14 B. Monr. 333, 343-348.

² 14 N. J. Eq. 23.

³ 14 Allen, 539, 572.

⁴ 41 N. Y. 328.

⁵ Cf. *Meller v. Stanley*, 2 De G. J. & S. 183, 192.

⁶ 59 Fed. Rep. (C. C. A.) 801.

⁷ 183 Mass. 165, 171, 172.

⁸ 192 Mass. 367.

⁹ 194 Mass. 540.

¹⁰ 233 Ill. 39.

¹¹ 77 N. J. Eq. 345.

¹² 81 N. J. Eq. 282.

¹³ 61 Pa. 73. See Foulke, *Treatise*, § 348; and see also § 208, *ante*.

¹⁴ 141 Mass. 401.

his estate to the executors of his will in trust to apply so much of the income as was needed to the support of his daughter for life, and "if she shall ever have a child or children" for the support of such children, "the balance of said income and the property after the death of my said child, and her child or children (if any), shall all be paid over" to a charitable society. The Court held that the gift to the society was vested and therefore not too remote. The correctness of this conclusion seems unquestionable. But the Court go on to say, "Moreover, the devise was to take full effect, with right of possession, upon the death of the testator's daughter, if she should leave no child. In point of fact, she left none. Therefore, in this alternative contingency, not only the estate, but the right of possession, would certainly vest within the permitted period; and as this contingency is the one which happened, the validity of the devise would not be affected by the consideration that the other contingency might be too remote." This *dictum* is hardly to be supported; there seems to be no separable limitation here.

§ 353 *c*. The case of *Siedler v. Syms*¹ is stated, § 410 *b*, *et seq.*, *post*.

§ 354. The statement in the Third Report of the Real Property Commissioners,² that "if an executory estate be limited to take effect, either in case A. shall die in the lifetime of B., or in case there shall be an indefinite failure of issue of C., the whole will be void," if it is intended to apply to the case where the contingencies are expressed separately, is certainly incorrect.³

§ 354 *a*. The doctrine that where a testator has not himself separated limitations, the law will not separate them for him is spoken of, by Jessel, M. R., in *Miles v. Harford*,⁴ as "technical," but it is an almost necessary doctrine, because the line of separation may be drawn at an infinite number of places, and

¹ 56 N. J. Eq. 275.

² P. 42.

³ As is remarked in Marsden, Perp. 78.

⁴ 12 Ch. D. 691, 704, quoted § 349, note, *ante*.

there is nothing to determine which of them shall be taken. Thus suppose personal property is bequeathed to A. and on default of his issue to B., the line may be drawn between a default of issue at A.'s death, and a default later; or between a default within twenty-one years after A.'s death, and a default later; or between a default within ten years after A.'s death, and a default later; or between a default during the lives of all the present reigning sovereigns of Europe, and a default later; or between a default during the lives of all the present members of the Briggsville Whist Club, and a default later; there is no guide for the court where the separation shall be made.¹

§ 355. The rule that you cannot split a gift must not be extended to the case of gifts to a class, where the gift to each member of the class is entirely independent of the gifts to the other members. Thus under a bequest of \$1,000 to each one of the testator's grandchildren who reaches twenty-five, grandchildren living at the testator's death will take the legacy, although those born afterwards cannot.²

§ 356. There is a special class of cases which seems to form an exception to the rule that a gift not split by the donor cannot be split by the law, but which, from its peculiar character, is not likely to be extended. When personal property is bequeathed to a series of persons not *in esse* by words which would create successive estates tail if the subject of the gift were real estate, and the first person does not come *in esse*, the next will take. For instance, suppose the bequest takes this, which is the usual, form: Leaseholds or other personal property are given to A. for life, remainder to the first and other sons of A. in succession, and the heirs male of their respective bodies; and in default of such issue of A., to B. for life, remainder to the first and other sons of B. in succession, and the heirs male of their respective bodies. Here if A. and B. die, and A. has no sons, then the first son of B. will take.

¹ See App. G, §§ 857 *et seq.*, *post.*

² See these cases discussed, §§ 389 *et seq.*, *post.*

§ 357. Mr. Lewis¹ and Mr. Jarman² do not seem to regard this as any exception to the ordinary mode of applying the Rule against Perpetuities. But an exception, it is submitted, it really is.³ If there were no Rule against Perpetuities the limitations over would take effect not merely if A. never had sons, but also if A. had sons whose issue afterwards failed. Now applying the Rule against Perpetuities, the limitation on the latter contingency is certainly too remote, and the limitation over in case A. has in fact no sons can only be preserved in one of the two following ways:—

§ 358. *First.* The gift over in case A. dies without ever having had male issue may be separated from the gift over in case such issue becomes extinct. By doing this the former gift can be sustained, although the latter is bad. But to do this is in conflict with the principle that a gift expressed as one cannot be separated into two, for there is certainly but one gift here expressed.

§ 359. *Secondly.* The gift over may be construed to be a gift only in case A. never has any male issue. But apart from the Rule against Perpetuities no such construction would

¹ Perp. 509; Suppl. 169.

² 2 Jarm. Wills (6th ed.) 1202. Cf. *In re Lowman*, [1895] 2 Ch. (C. A.) 348, 365–369.

³ See 2 Prest. Abs. 171. The opinions of Mr. Lewis and Mr. Jarman seem to rest upon the ground that there can be no executory bequest over after a bequest of personalty to one and the heirs of his body, and that therefore such a bequest as is given in the preceding section must have been intended to take effect only upon A.'s dying without having issue at his death. But an executory bequest after a bequest of personalty to one and the heirs of his body is in itself good. Thus where a leasehold is

bequeathed to A. and the heirs of his body, and if A. die without issue, living B., then to B., the gift to B. was held good in *Lamb v. Archer*, 1 Salk. 225, cited by Jarman in 2 Jarm. Wills (6th ed.) 1204. An executory bequest after an absolute bequest of personalty is bad only when and because it is too remote. Instances like that in the preceding section therefore seem in principle to belong to the class of cases where a settlor or testator has used only one expression to cover gifts upon contingencies which are too remote and contingencies which are not too remote.

ever be adopted, and it is settled law that the Rule ought not to affect construction.¹

§ 360. Whichever mode, therefore, of supporting the gift over under the circumstances that A. dies without ever having had issue is adopted, there seems to be an exception to the general rule.²

§ 361. Such limitations were originally held void for remoteness.³ But in *Higgins v. Dowler*⁴ (1707) Lord Cowper, C., held such a limitation to be good;⁵ and so did Sir Joseph Jekyll, M. R., in *Stanley v. Leigh*⁶ (1732). In 1734, however, in *Clare v. Clare*⁷ and *Sabbarton v. Sabbarton*,⁸ Lord Talbot, C., refused to follow *Higgins v. Dowler* and *Stanley v. Leigh*, and held such limitations to be too remote. But afterwards he sent a case arising under the same will as was in question in *Sabbarton v. Sabbarton* to the Court of King's Bench, who certified that the gift over was good;⁹ and Lord Hardwicke, who succeeded Lord Talbot, made, in 1739, a decree accordingly,¹⁰ and in *Gower v. Grosvenor*¹¹ (1740) he expressed a strong opinion to the same effect.¹²

§ 362. In the mean time the House of Lords, in *Brett v. Sawbridge*¹³ (1736), had held such a limitation too remote.

¹ See Chap. XIX., *post*; and also *Lamb v. Archer*, *ubi sup.*

² See 1 Jarm. Wills (6th ed.) 361.

³ *Backhouse v. Bellingham*, Pollexf. 33 (1664). *Burges v. Burges*, Pollexf. 40; 1 Mod. 115; 1 Ch. Cas. 229; Finch, 91 (1674); § 166, *ante*.

⁴ 1 P. Wms. 98; 2 Vern. 600; *sub nom.* *Higgins v. Derby*, 1 Salk. 156.

⁵ See *Stanley v. Leigh*, 2 P. Wms. 686, 694–698; *Clare v. Clare*, Cas. temp. Talb. 21, 26; *Wyth v. Blackman*, 1 Ves. Sr. 196, 202.

⁶ 2 P. Wms. 686.

⁷ Cas. temp. Talb. 21.

⁸ Cas. temp. Talb. 55.

⁹ *Sabbarton v. Sabbarton*, Cas. temp. Talb. 245, 250.

¹⁰ See 2 P. Wms. 699, note. The gift over in *Sabbarton v. Sabbarton* was on dying without leaving issue. This is now held in the case of personalty to refer to a definite failure of issue, *Forth v. Chapman*, 1 P. Wms. 663; 2 Jarm. Wills (6th ed.) 1959; but Lord Talbot considered that an indefinite failure of issue was meant, and so did Lord Hardwicke. See *Gower v. Grosvenor*, 5 Mad. 337, 346, 347; *Barnard. Ch.* 54, 61, 62.

¹¹ 5 Mad. 337; *Barnard. Ch.* 54.

¹² But see Lord Hardwicke's remarks in *Wyth v. Blackman*, 1 Ves. Sr. 196, 202.

¹³ 3 Bro. P. C. (Toml. ed.) 141.

But in *Pelham v. Gregory*¹ (1760) they held it good whenever the persons to whom the prior interests were given did not in fact come into existence; and the law has been so settled in England ever since.²

§ 363. Where personalty is given to go according to limitations of realty, the words "so far as law and equity will permit," or like expressions, are often used, and, in connection with the exception just discussed, have given rise to a series of cases.³

§ 364. It was once held by Lord Hardwicke, C.,⁴ that such a trust was executory, and that the personalty ought to be so settled that if the first tenant in tail died under twenty-one it would go over to the person who should succeed him in the realty.⁵

§ 365. But this is now overruled, and it is settled that

¹ 3 Bro. P. C. (Toml. ed.) 204.

² *Knight v. Ellis*, 2 Bro. C. C. 570. *Phipps v. Mulgrave*, 3 Ves. Jr. 613. *Boydell v. Golightly*, 14 Sim. 327. *Lewis v. Hopkins*, 3 Drew. 668; *sub nom.* *Williams v. Lewis*, 6 H. L. C. 1013. *In re Lowman*, [1895] 2 Ch. (C. A.) 348. *Lewis*, *Perp. Suppl.* 87, 88, 169. *Marsden*, *Perp.* 127. 3 *Dav. Prec. Conv.* (3d ed.) 602, note.

³ It may be worth while to note the following passage in *Haven v. Haven*, 181 Mass. 573, 578: "Assuming that under our law as under the English law, see *Hill v. Hill*, [1897] 1 Q. B. 483, personal chattels may be disposed of by will so as to pass with the realty as heirlooms or as fixtures in the nature of heirlooms, there is no intention manifested that the title to or even the possession of the portraits should pass with or accompany the title to the mansion house." In its legal sense an "heirloom" is a chattel which goes to the heir, not as a fix-

ture to realty, but by an immemorial special custom. There are therefore no "heirlooms," properly so called, in this country. "Heirloom" is often, however, used in its popular sense as meaning a chattel which is settled or bequeathed so as to go to the person to whom certain real estate goes. An "heirloom" in this sense does not differ, in the eye of the law, from any other chattel; it is merely a chattel given to certain persons, and as in *Hill v. Hill*, *ubi sup.*, it is in this popular sense that "heirloom" is used in *Haven v. Haven*, *ubi sup.* See *per Chitty, J.*, in *Hill v. Hill*, [1897] 1 Q. B. 483, 494, 495; 1 *Wms. Exec.* (9th ed.) 633 *et seq.*; *Wms. Pers. Prop.* (17th ed.) 141, 142.

⁴ *Gower v. Grosvenor*, 5 *Mad.* 337; *Barnard*. Ch. 54.

⁵ He made a like ruling in *Traford v. Trafford*, 3 *Atk.* 347. See *Scarsdale v. Curzon*, 1 *J. & H.* 40, 59-61.

where personalty is placed in trust to go with settled land, "so far as the rules of law or equity will permit," every one who takes a life estate in the realty takes a life interest in the personalty until you come to a person in whom vests an estate tail in the realty. Such a person takes an absolute interest in the personalty.¹ It has often, however, been regretted that these trusts are not still deemed executory.²

§ 366. Sometimes an express provision prevents such an executed trust of personalty from vesting absolutely in the first tenant in tail before he reaches twenty-one.³

¹ *Foley v. Burnell*, 1 Bro. C. C. 274, 285; 4 Bro. P. C. (Toml. ed.) 319. *Vaughan v. Burslem*, 3 Bro. C. C. 101. *Fordyce v. Ford*, 2 Ves. Jr. 536. *Carr v. Erroll*, 14 Ves. 478. *Stratford v. Powell*, 1 Ball. & Beat. 1. *Rowland v. Morgan*, 6 Hare, 463; 2 Phil. 764. *Doncaster v. Doncaster*, 3 K. & J. 26. *Johnson's Trusts*, L. R. 2 Eq. 716. See especially *Scarsdale v. Curzon*, 1 J. & H. 40, where the cases are fully discussed; and also *Christie v. Gosling*, L. R. 1 H. L. 279; *Harrington v. Harrington*, L. R. 3 Ch. 564; L. R. 5 H. L. 87, 101, 107; *In re Exmouth*, 23 Ch. D. 158; *In re Johnston*, 26 Ch. D. 538; *In re Angerstein*, [1895] 2 Ch. 883; *In re Hill*, [1902] 1 Ch. 537; [1902] 1 Ch. (C. A.) 807; *In re Fothergill's Estate*, [1903] 1 Ch. 149; *In re Chesham*, 31 Ch. D. 466; *In re Chesham's Settlement*, [1909] 2 Ch. 329; *Lewis*, *Perp.* 585, 644, 645; 1 *Jarm. Wills* (6th ed.) 692 *et seq.*; *Theob. Wills* (7th ed.) 720; 3 *Dav. Prec. Conv.* (3d ed.) 600, 601; *Lewin, Trusts* (10th ed.) 133; 2 L. C. in *Eq.* (8th ed.) 788, 805 *et seq.* Cf. *Montagu v. Inchiquin*, 23 W. R. 592; *In re Bute*, 27 Ch. D. 196; *In re Finch's Contract*, [1903] 2 Ch. 486.

² *Per Lord Eldon*, *Lincoln v. Newcastle*, 12 Ves. 218, 236. *Per Lord Cottenham*, *Rowland v. Morgan*, 2 Phil. 764, 767. *Per Lords Westbury and Cairns*, *Harrington v. Harrington*, L. R. 5 H. L. 87, 101, 107. See *In re Hill*, [1902] 1 Ch. (C. A.) 807, 815.

As to the provisions which will make such a trust executory, and as to how such a trust, when executory, will be executed, see *Newcastle v. Lincoln*, 3 Ves. Jr. 387; 12 Ves. 218; *Scarsdale v. Curzon*, 1 J. & H. 40; *Holmesdale v. West*, L. R. 3 Eq. 474; *sub nom.* *Sackville-West v. Holmesdale*, L. R. 4 H. L. 543; *Shelley v. Shelley*, L. R. 6 Eq. 540; *Miles v. Harford*, 12 Ch. D. 691; *Marsden*, *Perp.* 131-135; 2 L. C. in *Eq.* (8th ed.) 789; *Lewin, Trusts* (10th ed.) 124-126, 132-134; § 418, *post.* The usual form of executing such a trust is to suspend vesting in the first tenant in tail until he reaches the age of twenty-one years.

³ See *Newcastle v. Lincoln*, 3 Ves. Jr. 387; 12 Ves. 218; *Potts v. Potts*, 3 J. & Lat. 353; 1 H. L. C. 671 (*Sugd. Law Prop.* 293-299); *Scarsdale v. Curzon*, 1 J. & H. 40; *Cox v. Sutton*, 25 L. J. Ch. 845; 2

§ 367. A gift of personalty which would be otherwise good under the preceding sections is not rendered bad by a provision that it shall not vest absolutely in any tenant in tail unless he shall attain the age of twenty-one years. Such provision is only applicable to those who might otherwise have taken, viz., tenants in tail by purchase; it does not have the effect of extending the number who could take, and thereby rendering the gift remote.¹

§ 368. The separableness of gifts to classes and to series will be considered in the two following chapters.

Jur. N. S. 733; *Hogg v. Jones*, 32 Beav. 45; *Johnson's Trusts*, L. R. 2 Eq. 716; *Harrington v. Harrington*, L. R. 3 Ch. 564; L. R. 5 H. L. 87, 93, note; *Holloway v. Webber*, L. R. 6 Eq. 523; *sub nom. Martelli v. Holloway*, L. R. 5 H. L. 532; *In re Fothergill's Estate*, [1903] 1 Ch. 149; 1 L. C. in Eq. (5th ed.) 36; *In re Chesham*, 31 Ch. D. 466; *In re Chesham's Settlement*, [1909] 2 Ch. 329; 1 Jarm. Wills (6th ed.) 692 *et seq.*, 698, note; *Theob. Wills* (7th ed.) 721; 3 *Dav. Prec. Conv.* (3d ed.) 625, note; *Hayes & Jarm. Forms of Wills* (13th ed.) 428, 429.

¹ *Gosling v. Gosling*, 1 De G. J.

& S. 1; *sub nom. Christie v. Gosling*, L. R. 1 H. L. 279 (overruling *Gosling v. Gosling*, 32 Beav. 58). *Holloway v. Webber*, L. R. 6 Eq. 523; *sub nom. Martelli v. Holloway*, L. R. 5 H. L. 532. *Harrington v. Harrington*, L. R. 3 Ch. 564; L. R. 5 H. L. 87. *Wells v. Wells*, [1890] W. N. 29. *Marsden, Perp.* 124-131.

As to a gift of the principal of a fund "after the law admits of no further division" of the income, see *Pownall v. Graham*, 33 Beav. 242; *In re Moore*, [1901] 1 Ch. 936; *Fitchie v. Brown*, 18 *Hawaii*, 52; 211 U. S. 321; §§ 219-219 *b, ante*.

CHAPTER X.

LIMITATIONS TO CLASSES.

§ 369. THERE is often a gift to a class of persons,¹ for example, to the grandchildren of a testator, upon a contingency which may happen beyond the limits of the Rule against Perpetuities; as, for instance, a bequest of money to be divided among those of the testator's grandchildren who reach twenty-five. Such a gift is bad, although the testator has grandchildren living at his death.² For although, if the living grandchildren reach twenty-five, they must do so during lives in being at the testator's death, namely, their own lives, yet as they may all die before reaching twenty-five, the class may ultimately be composed of grandchildren not born at the testator's death, and the bequest may therefore vest more than twenty-one years after the end of all lives then in being.

§ 370. A devise to the testator's grandchildren as a class is good if the vesting is not postponed to a time after they become of age, for they must all become of age within twenty-one years after the death of their parents (the testator's children), and the parents must all have been born (or begotten) in the testator's lifetime.³ What is true of a devise to grand-

¹ A class is a number of persons having a common characteristic. By a gift to a class is meant a gift to persons, the share of each of whom is determined by the number of the class. See 1 Jarm. Wills (6th ed.) 336, 431 *et seq.*

² But see *Edgerly v. Barker*, 66 N. H. 434; § 398 *b*, and App. G, §§ 857 *et seq.*, *post*.

³ *Woodruff v. Pleasants*, 81 Va. 37. *Otterback v. Bohrer*, 87 Va. 548. Gifts, however, have often failed by being made to such grandchildren as survive both their parents, viz. the testator's child, and his or her wife or husband. As the testator's child may marry some person unborn at the testator's death, such a gift to grandchildren is too remote. See § 214, *ante*.

children of the testator is true also of a devise to grandchildren of a person who has died before the testator; but a devise at majority to all the grandchildren of a person who is living at the testator's death is bad, for such person may have children born after the testator's death, and the children of such children may not be born within twenty-one years after the death of all persons living at the testator's death.¹

§ 371. In a marriage settlement limitations to the grandchildren of the parties of the marriage are not good, and limitations to the children, in order to be good, must vest in them not later than twenty-one.

§ 372. The usual case of a gift to a class which violates the Rule against Perpetuities is that of a devise to such of the grandchildren of the testator (or of the children of some living person) as reach an age over twenty-one, say twenty-five; and this will serve as a typical case. The first point to consider is whether the devise is to vest at twenty-five, or whether it vests at the death of the parent (or other period not too remote), subject to be divested if a devisee dies under twenty-five. In the former case the devise is bad; in the latter the devise is good, and the divesting gift over bad.²

§ 373. Assuming then that the devise is not to vest until the remote period, the devise to the whole class is bad; and it is immaterial that some persons are *in esse* who, should they reach twenty-five, would be entitled to share, for none of them may reach twenty-five, and the whole class may ultimately be composed of persons who are not born at the testator's death. This seems to have been first ruled by Lord Kenyon in *Jee v. Audley*³ (1787); but the most important case is *Leake v. Robinson* (1817),⁴ in which Sir William Grant,

¹ *Belfield v. Booth*, 63 Conn. 299.

² The cases on this question of construction are very numerous. See Chap. III., *ante*, and § 209, *ante*; *Re Bevan's Trusts*, 34 Ch. D. 716; 1 Jarm. Wills (6th ed.) c. 37;

Theob. Wills (7th ed.) c. 44; Hawkins, Wills, c. 18; Marsden, Perp. c. 11.

³ 1 Cox, 324.

⁴ 2 Mer. 363, 388 *et seq.* See *Lyons v. Bradley*, 168 Ala. 505, 515.

M. R., held that the whole gift was void, and so the law has stood ever since.

§ 374. The later cases in which gifts by will to grandchildren of the testator (or to children of living persons) on their attaining an age greater than twenty-one have been held void for remoteness are numerous.¹ So limitations in a marriage settlement to children of the marriage at an age beyond twenty-one are too remote.² And a gift by will to be divided between such grandsons as reach twenty-eight, and such granddaughters as reach twenty-one, is bad altogether.³

§ 375. In gifts to those members of a class who reach a

¹ *Bull v. Pritchard*, 1 Russ. 213; 5 Hare, 567. *Vawdry v. Geddes*, 1 Russ. & M. 203. *Judd v. Judd*, 3 Sim. 525. *Dodd v. Wake*, 8 Sim. 615. *Newman v. Newman*, 10 Sim. 51. *Cromek v. Lumb*, 3 Y. & C. 565. *Comport v. Austen*, 12 Sim. 218. *Blagrove v. Hancock*, 16 Sim. 371. *Boughton v. James*, 1 Coll. 26; *sub nom.* *Boughton v. Boughton*, 1 H. L. C. 406. *Ring v. Hardwick*, 2 Beav. 352. *Griffith v. Blunt*, 4 Beav. 248. *Bute v. Harman*, 9 Beav. 320 (headnote wrong, see *Boreham v. Bignall*, 8 Hare, 131, and *Southern v. Wollaston*, 16 Beav. 166, 168, note b). *Palmer v. Holford*, 4 Russ. 403. *Williams v. Teale*, 6 Hare, 239. *Boreham v. Bignall*, 8 Hare, 131. *Southern v. Wollaston*, 16 Beav. 166. *Pickford v. Brown*, 2 K. & J. 426. *Chance v. Chance*, 16 Beav. 572. *Merlin v. Blgrave*, 25 Beav. 125. *Rowland v. Tawney*, 26 Beav. 67. *Thatcher's Trusts*, Id. 365. *Thomas v. Wilberforce*, 31 Beav. 299. *Sayer's Trusts*, L. R. 6 Eq. 319. *Whitehead v. Bennett*, 22 L. J. Ch. 1020. *Patching v. Barnett*, 49 L. J. Ch. 665; 51 L. J. Ch. 74. *Bowyer v. West*, 24 L. T. R.

414. *Willson v. Cobley*, [1870] W. N. 46. *Blight v. Hartnoll*, 19 Ch. D. 294. *Sears v. Putnam*, 102 Mass. 5. *Hall v. Hall*, 123 Mass. 120. *Davenport v. Harris*, 3 Grant (Pa.), 164. See *Gooch v. Gooch*, 14 Beav. 565; 3 De G. M. & G. 366; *Courtier v. Oram*, 21 Beav. 91; *Read v. Gooding*, Id. 478; 4 De G. M. & G. 510; *Taylor v. Frobisher*, 5 De G. & Sm. 191; *Fosdick v. Fosdick*, 6 Allen, 41; *Howe v. Hodge*, 152 Ill. 252; *Lawrence v. Smith*, 163 Ill. 149. (On this case see § 249 *e*, *ante*.) In *Meyers v. Hamilton Provident Co.*, 19 Ont. 358, land was devised to be sold within three years after M.'s youngest child should reach twenty-one, the proceeds to be equally divided between M.'s children at the time of the sale. The devise was held too remote. The headnote to this case is inexact.

² *Routledge v. Dorril*, 2 Ves. Jr. 357. *Blakemore's Settlement*, 20 Beav. 214. *Morse's Settlement*, 21 Beav. 174. *Meikleham v. Meikleham*, [1873] W. N. 46. *Re Warden*, 82 L. T. 228.

³ *Ker v. Hamilton*, 6 Vict. L. R. 172.

required age, which all the members of the class may not reach till a period beyond the limits of the Rule against Perpetuities, there is often a member of the class who, if he ever reaches the required age, must do so within the limits of the Rule; e. g. a grandchild of the testator born before the latter's death. When such member reaches the required age, say twenty-five, the class is closed,¹ and he is entitled to have his proportionate share paid to him. This time of payment to him is not too remote, and if it were the only payment to him, it would be good. But there may be further payments to him or his representatives; other members of the class, then living, may die before they reach twenty-five, and then his share will be increased by other payments, which may fall beyond the limits of the Rule; the whole gift will be held void.² This was the character of the circumstances in *Leake v. Robinson*,³ and in many of the long series of cases cited in the note to the preceding section.⁴

§ 375 a. In *Estate of Williamson*⁵ a testator directed that the income of his estate should be paid to his four children in equal shares for life, and on the death of each child one-fourth of the principal of the estate should be conveyed to those of its children who should have attained or should attain twenty-five, and to the issue of any such who should have died or who should die under that age leaving issue. By a codicil he directed that the principal of the whole estate should be "reserved and preserved" for all his grandchildren in equal shares *per capita*, and, therefore, that as each grandchild became entitled to receive its share the same should be determined "by the quotient of the whole reserved principal divided by the whole number of my grandchildren then living,

¹ See § 379, *post*.

² "It cannot take effect partially, or by instalments, so as to be valid as to that minimum amount, or share, to which every grandchild attaining twenty-two must, at all events, be entitled,

and void for remoteness as to anything accruing by survivorship." Marsden, Perp. 87.

³ 2 Mer. 363, 388 *et seq.*

⁴ See also §§ 381-385, *post*.

⁵ 12 Phila. 64.

and the issue of such of them as shall have previously died leaving issue," *per stirpes*. The Orphans' Court of Philadelphia held that, so far as concerned such grandchildren as should attain twenty-five, the validity of the gift to them would depend on the contingency of whether they reached twenty-five "within twenty-one years of the death of the child whose share is to be divided;" that if they did not, "the limitation to this extent will fail, and there will be *pro tanto* an intestacy." Even assuming the gifts to the grandchildren to be separable,¹ which is more than questionable, only those grandchildren born in the testator's lifetime could take; the fact that after-born grandchildren might happen to reach twenty-five within twenty-one years after the death of the child whose share was to be divided is immaterial; and in *Coggins' Appeal*² the same will was before the Supreme Court of Pennsylvania, and the gifts to the grandchildren were held not to be separable, and to be all too remote.

§ 376. A gift to the grandchildren of a woman, or to such of her children as reach an age greater than twenty-one, is not rendered good by the fact that the woman is past child-bearing. For the purpose of applying the Rule against Perpetuities, both men and women are considered capable of having issue so long as they live.³

§ 377. A gift to a class which will take effect, if at all, as a legal remainder of real estate, at the termination of a life in being, is good, although if it had been an executory devise or a gift of an equitable interest or of personalty it would have been bad.⁴

§ 378. When a devise is confined to those grandchildren of a testator who are living at his death, it is good at whatever age they are to take. So, a devise over on the death under twenty-one of those grandchildren of A. who are born at A.'s death.⁵

¹ §§ 389 *et seq.*, *post*.

² 124 Pa. 10. See Foulke, Treatise, § 471.

³ § 215, *ante*.

⁴ § 325, *ante*.

⁵ *Trickey v. Trickey*, 3 Myl. & K. 560. *Re Watkins*, 37 W. R. 609. Cf. *Hamilton v. Rodgers*, 38 Ohio St. 242, 258.

§ 379. Whenever a gift is made to such children, or members of some other class, as reach a certain age, the class is closed when one member of it reaches the required age; no after-born person can be included in it.¹ Therefore, upon a devise to such grandchildren of the testator (or to such children of a living person) as reach twenty-five, if one or more of the grandchildren (or children) have reached twenty-five at the testator's death, the devise is not too remote, for no persons can be included in the class except those who are living at the testator's death.²

§ 380. In *Porter v. Fox*³ there was a gift to the testator's nephew, T., and to the testator's grandchildren (his children being alive), to be distributed equally as T. and the grandchildren should reach twenty-five. Shadwell, V. C., held that the gift to T. was void, as well as that to the grandchildren. The correctness of this decision was questioned by Stuart, V. C.,⁴ but without just reason. It is true that if T. is ultimately a member of the class, he must become so within a life in being at the testator's death, viz. his own life; but then he may die before reaching twenty-five, and so never be a member of the class at all; and even if he is a member of the class, his share cannot be determined until all the grandchildren born before he reaches twenty-five themselves reach twenty-five or die, and that may be more than twenty-one years after the death of all persons living at the testator's death. *Porter v. Fox* was followed in *Webster v. Boddington*.⁵

¹ *Hoste v. Pratt*, 3 Ves. Jr. 730.
² Jarm. Wills (6th ed.) 1675 *et seq.*
¹ Roper, Wills (4th ed.) 46.

² *Picken v. Matthews*, 10 Ch. D. 264. See *Re Whitten*, 62 L. T. R. 391; *Re Barker*, 92 L. T. R. 831.

³ 6 Sim. 485.

⁴ In *James v. Wynford*, 1 Sm. & G. 40, 57-59.

⁵ 26 Beav. 128. See Lewis, Perp. 456, 457; 1 Jarm. Wills (6th ed.) 339. At the place where Jar-

man speaks of *Porter v. Fox* with approval, the editors of his third edition said, "If the gift were in joint tenancy, would the whole fund accrue to the individual?" and see Theob. Wills (7th ed.) 607; Marsden, Perp. 101. But as the interests of T. and the grandchildren would vest at different times, they could not be joint tenants. *Woodgate v. Unwin*, 4 Sim. 129. *Hand v. North*, 10 Jur. n. s. 7.

§ 381. A common form of limitation is to give the property to such of the children of A., a living person, as reach twenty-one, and such of the children as reach twenty-one of any children of A. who die under twenty-one, these latter taking the parents' share. Here there is a gift to a class composed of children and grandchildren of A. at twenty-one. The maximum number of shares is fixed at the death of A., for as the grandchildren take only their parents' share, the number of shares cannot exceed the number of A.'s children who are living at his death; but if any one of A.'s children is under age at A.'s death, such child may die under age, leaving a child who may not become of age till more than twenty-one years after all the lives in being at the death of the testator have ended, and as therefore the minimum number of shares may not be determined within the prescribed limits the whole gift is void.¹

§ 382. That such limitations are bad *in toto* is a necessary deduction from *Leake v. Robinson*,² and they were so held in *Seaman v. Wood*³ and *Webster v. Boddington*.⁴ A like decision was made by Malins, V. C., in *Stuart v. Cockerell*,⁵ and affirmed by the Lords Justices;⁶ yet in *Smith v. Smith*⁷ Malins, V. C., decided the point the other way, but he was overruled in the Court of Appeal by Lord Hatherley, C., and Giffard, L. J. In *Re Moseley's Trusts*⁸ the same question came again before Malins, V. C. *Smith v. Smith* was not referred to, and the Vice-Chancellor decided, as he had in that case, that the gift to the children was separable from that to the grandchildren, and therefore good. But in *Hale v. Hale*⁹ Jessel, M. R., decided, in accordance with *Seaman v. Wood*, *Webster v. Boddington*, *Stuart v. Cockerell*, and the decision of the Court of Appeal in *Smith v.*

¹ Should one of A.'s children have reached twenty-one at the testator's death, the limitation would be good, as no children born after the testator's death would be allowed to share. See § 379, *ante*.

² 2 Mer. 363.

³ 22 Beav. 591.

⁴ 26 Beav. 128. See *Speakman v. Speakman*, 8 Hare, 180; *Salmon v. Salmon*, 29 Beav. 27.

⁵ L. R. 7 Eq. 363.

⁶ L. R. 5 Ch. 713.

⁷ L. R. 5 Ch. 342.

⁸ L. R. 11 Eq. 499.

⁹ 3 Ch. D. 643.

Smith, that the whole gift was void, and showed conclusively that this result was a necessary consequence of the law as it had been held ever since *Leake v. Robinson*;¹ and Fry, J., made a ruling to the same effect in *Bentinck v. Portland*.²

§ 383. After this the same will upon which Malins, V. C., had passed in *Re Moseley's Trusts* came before Jessel, M. R., who held, as he had held before in *Hale v. Hale*, that the gift to the grandchildren could not be separated from that to the children, and that the whole was bad.³

§ 384. The case was carried to the Court of Appeal, consisting of James, Baggallay, and Bramwell, L.JJ., who held themselves bound by *Smith v. Smith*, and therefore affirmed the decision of the Master of the Rolls. But they all, most unaccountably, expressed their disapproval of *Smith v. Smith*. James, L. J., said that he entirely went along with the reasoning by which Malins, V. C., arrived at his conclusion in *Moseley's Trusts*,⁴ and that if he had been at liberty to express his own opinion he "should, without any doubt or hesitation, have concurred in that conclusion." Baggallay, L. J., also felt bound to say for himself that he agreed with the views expressed by Vice-Chancellor Malins. And Bramwell, L. J., while agreeing that the Court was bound by *Smith v. Smith*, craved "leave also to express a very considerable distrust as to the arguments by which that decision was arrived at."⁵ The learned Lords Justices gave no reasons, however, for thinking *Smith v. Smith* wrong.

§ 385. The case then went by appeal to the House of Lords.⁶ The law lords (Lords Selborne, Penzance, Blackburn, and Watson) were much puzzled at the opinion expressed by the judges of the Court of Appeal, that their own decision was wrong, and

¹ 2 Mer. 363.

² 7 Ch. D. 693. In *Re Farnscombe*, 9 Ch. D. 652, Hall, V. C., made a decision in accordance with that of Malins, V. C., in *Re Moseley's Trusts*, L. R. 11 Eq. 499.

³ *Moseley's Trusts*, 11 Ch. D. 555.

⁴ L. R. 11 Eq. 499.

⁵ *Moseley's Trusts*, 11 Ch. D. 555.

⁶ *Pearks v. Moseley*, 5 Ap. Cas. 714.

wondered what the reasons of those judges could be: but they all held that the decision was right; that whatever might have been said if the question had been an open one, it had been "long since conclusively determined by authority;" that they were "surprised to find it raised at this time;" that it "was really the point decided in the case of *Leake v. Robinson*;" that they felt "some degree of surprise, after that very careful and well-reasoned judgment," in *Hale v. Hale*, "that encouragement should have been given to the appellant to bring this question" to the House of Lords; and that "no authority less than the Legislature can alter it." This case lays any doubts as to the true rule. The remarkable thing is that such doubts should have been entertained by so many learned persons.¹

§ 386. If there is no original gift to a class to be ascertained at too remote a period, but the original gift is to a class which can be ascertained within the required limits, and there is then a substitutionary clause which may take effect beyond those limits, the original gift is good, and the substitution is bad; and the courts have shown themselves astute to construe gifts to issue as substitutional, and thus preserve the gifts to the parents.²

§ 387. In *Packer v. Scott*³ a testatrix bequeathed her personal property in trust when and as the child or children of her niece should severally attain twenty-one years, to pay and divide it equally between them and the child or children of such of them (if any) as might die under twenty-one years, but so as, nevertheless, that the child, or the children collectively, of any deceased child, on their severally attaining twenty-one years, should take between them, equally, such share only as his, her, or their parent would have taken if living; and the will directed that so long as any child or children of the niece,

¹ See 50 L. T. 255; 67 L. T. 432; 69 L. T. 205; *Webster v. Parr*, 26 Beav. 236. The case has been followed in *Blight v. Hartnoll*, 19 Ch. D. 294, *Re Dawson*, 39 Ch. D. 155, and *Re Whitten*, 62 L. T.

R. 391. See *Re Watkins*, 37 W. R. 609. Cf. *Andrews v. Rice*, 53 Conn. 566, under the Connecticut statute.

² *Marsden, Perp.* 94-98. 1 Jarm. Wills (6th ed.) 333.

³ 33 Beav. 511.

or any descendant of such child or children, should be under twenty-one years, and the niece should be living, the income arising from the share or shares to which such child or children or descendant thereof should be presumptively entitled should be paid to the niece, to be applied by her for their maintenance. The testatrix authorized the trustees to advance any sum, not exceeding £100 for each such child or descendant of a child, by and out of their shares for their advancement, and directed, if the niece should die before the shares were payable, that the trustees should apply the income towards the maintenance of the persons respectively who might then be presumptively entitled thereto. Sir John Romilly, M. R., said in his opinion, which is briefly reported in 33 Beavan, and apparently nowhere else: "I should be striking words out of this will if I held that the payment or division could be postponed until the children of a deceased child of the niece attained twenty-one; for the attainment by a child of the niece of the age of twenty-one is stated to be the period at which the gift is to take effect." But suppose that *all* the children of the niece had died under twenty-one, could a division be made until at least some *one* grandchild reached twenty-one? This, however, might be beyond the limits fixed by the Rule against Perpetuities. The decision seems highly questionable.¹

§ 388. In *Goodier v. Johnson* ² a testator directed his trustees, after the death of the longest liver of his daughter M., his son W., and any widow his son might leave, to sell his real estate and hold the proceeds, and, until sale, the rents and profits, in trust to pay and apply them "unto and equally amongst all and every the child and children of" W. and M., "share and share alike, and the lawful issue of such of them as may be then dead leaving issue, such issue to be entitled to no more than their parent or respective parents would have been if living." He also directed that if the son, then living, of M. should die without leaving issue, or leaving issue and

¹ See 1 Jarm. Wills (6th ed.) ² 18 Ch. D. 441.
333, note (l).

all of them should die under age and unmarried, then the share of money which would have been payable to him under the aforesaid trusts should be paid over to X., and also that if W. should die without leaving any issue, or leaving any all of them should die under age and unmarried, then the share which would have been payable to the children of W. under the trusts aforesaid should be paid over. The Court of Appeal held that although the trust for sale might be bad,¹ as it was not to take effect until the death of the son's widow, who might not have been born in the testator's lifetime, yet that the right to the property was in *all* the children of W. and of M., and not merely in those who should be living at the death of the son's widow, and the issue of those who had then deceased; in other words, that the children had vested interests, which on their death without issue would pass to their representatives; that the gift to the issue of such as should then be dead leaving issue was substitutional, although there was here "a difficulty, the words used not being appropriate to a clause of substitution,"² and was bad as being too remote, leaving the gifts to the children indefeasible. The decision is near the line.³

§ 389. *Independent Gifts.* — When gifts are made to several persons by one description, but the amount of the gift to one is not affected by the existence or non-existence of the others, then the gifts are separable. Thus if the testator gives £1,500 to each one of X.'s children who reaches twenty-five, each child born before the testator's death will, upon reach-

¹ On this see §§ 509 *a*, *et seq.*, *post*.

² *Per* Jessel, M. R., p. 446.

³ See *Speakman v. Speakman*, 8 Hare, 180; *Taylor v. Frohisher*, 5 De G. & Sm. 191; *Gooch v. Gooch*, 3 De G. M. & G. 366; *Baldwin v. Rogers*, Id. 649. Cf. *Goodier v. Edmunds*, [1893] 3 Ch. 455.

A useful list of the English cases

in which gifts to classes have been held too remote will be found in *Marsden*, Perp. 107-111.

On the question how far the Rule against Perpetuities has affected or ought to affect the application of rules of construction to the time for determining a class, see §§ 634 *et seq.*, *post*.

ing twenty-five, take the legacy, although those born after will not. *Boughton v. James*.¹ *Storrs v. Benbow*.² And again, although the amount of each legacy is dependent upon the number of legatees, yet if this number must be determined within the required limits the gifts are separable. Thus if a fund is given to be divided into as many shares as there are children of A. who survive A., one share to be paid to each child for life, and on his death to its children, the children of those children of A. who were born in the testator's life will take the share in which their parent had a life interest, while the children of such children of A. as were not born until after the testator's death will take nothing.³

¹ 1 Coll. 26. The report of this case in Collyer's Reports does not show that the point was so decided, but it appears from the report of the case on appeal. *Boughton v. Boughton*, 1 H. L. C. 406, 414.

² 3 De G. M. & G. 390. In this case a testator directed his executors to pay £500 apiece to each child that might be born to either of the children of either of his brothers. Lord Cranworth, C., held that a grandchild of a brother of the testator, which grandchild was living at the testator's death, was entitled to his legacy. Unless the gift was to be confined to such grandchildren as had been born at the testator's death (as Sir John Leach, M. R., thought, *Storrs v. Benbow*, 2 Myl. & K. 46), it would seem that all the grandchildren whose parents had been born at the date of the testator's death ought to take. See *Blandford v. Thackerell*, 2 Ves. Jr. 238, commented on in *Leake v. Robinson*, 2 Mer. 363, 392.

³ *Griffith v. Pownall*, 13 Sim. 393. *Cattlin v. Brown*, 11 Hare, 372. *Wilson v. Wilson*, 4 Jur. N. S.

1076; 28 L. J. Ch. 95. (See 4 Jur. N. S. pt. 2, 497, 512, 520.) *Wilkinson v. Duncan*, 30 Beav. 111 (§ 523 c, post). *Knapping v. Tomlinson*, 34 L. J. Ch. 3; 10 Jur. N. S. 626. *Von Brockdorff v. Malcolm*, 30 Ch. D. 172. *In re Coulman*, Id. 186 (§ 523 f, post). *Bell v. Bell*, 13 Ir. Ch. 517. *M'Donald v. Jones*, 40 Nov. Sc. 232. *Lupton v. Elliott*, 11 N. S. Wales L. R. Eq. 87. See *Bentinck v. Portland*, 7 Ch. D. 693, 700; *Fonseca v. Jones*, 21 Manitoba, 168, 189. Cf. *Cromek v. Lumb*, 3 Y. & C. 565; *Sumner v. Westcott*, 86 Conn. 217. The case of *Arnold v. Congreve*, 1 Russ. & M. 209, § 424, post, is contrary to the later authorities, and must be considered as not correctly stating the law. See *Knapping v. Tomlinson*, *ubi sup.* *Re Phillips*, 28 Ont. L. R. 94, seems to be a case where the same doctrine should have been applied.

On the treatment of restraints on the alienation of estates in connection with the Rule against Perpetuities, when the estates are independent, see §§ 432-441, post.

§ 391. The case of *Greenwood v. Roberts*¹ has been much discussed. There was a bequest to A. for life, and on his death to such of his children as might be then living, in equal shares, for their respective lives, and on the death of any of them its share of the principal to be divided among its children when they should become of age; and the testator further directed that if any of A.'s children should at A.'s decease be dead and have left issue, such issue should be entitled to the share of the principal to which their parent would have been entitled had he survived A. A. had children born in the testator's lifetime. Sir John Romilly, M. R., held that the gifts to the children of those children of A. who were born before the testator's death were not separable from the gifts to the children of those children of A. who were not born till after the testator's death, and that therefore none of the grandchildren of A. could take any share. He said the gift was "distinctly to a class." In *Cattlin v. Brown*² Wood, V. C., approved the decision in *Greenwood v. Roberts*, on the ground that the children of A. *in esse* at the testator's death might all die before A.; but surely that circumstance is immaterial, — the important matter is that the shares must be definitely fixed at the death of A.; and, as is pointed out by a writer in the *Jurist*,³ and by Kindersley, V. C., in *Knapping v. Tomlinson*,⁴ the reason given and approved by Wood, V. C., as the ground for the decision in *Greenwood v. Roberts*, would have required him to decide *Cattlin v. Brown* precisely contrary to what he did. In *Webster v. Boddington*⁵ Sir John Romilly, M. R., defended *Greenwood v. Roberts* on a ground which is not suggested in the original opinion. He said the time for determining the shares was not when A. died, nor when his children reached twenty-one, but when a class composed of all the children of A. who reached twenty-one, and also of all the children who reached twenty-one of children of A. who

¹ 15 Beav. 92.

⁴ 34 L. J. Ch. 3.

² 11 Hare, 372.

⁵ 26 Beav. 128.

³ 4 Jur. N. S. pt. 2, 512, 520.

died before reaching twenty-one, reached twenty-one, and that as this might not happen till beyond the required limits the whole gift was too remote. It is hard to see how such a construction could be put on the will, but on such a construction of course the decision was correct.¹ The cases cited in § 389, *ante*, as well as the reason of the thing, show that when, on a gift to a class, the number of the shares is definitely fixed within the time required by the Rule against Perpetuities, the question of remoteness is to be considered with reference to each share separately.

§ 392. There are cases in the United States to the same effect. In *Lowry v. Muldrow*² there was a devise to A. for life, remainder to his children for life, the share of each child to go to its children in fee. All of A.'s children were in fact born at the death of the testator. It was held that the limitation to their children was not too remote. In *Hills v. Simonds*³ there was a devise to the children of the testator's brothers and sisters for life in equal shares, and after the death of each its share to go to its children or legal representatives. The testator's brothers and sisters were living at his death. It was held that the gift to the children or legal representatives of such of the children of the testator's brothers and sisters as were, in fact, born in his lifetime was not too remote.⁴

§ 393. In two cases, however, in Massachusetts the principle was overlooked. In *Sears v. Russell*⁵ property was devised in trust for the testator's daughter A. for life, and on her death for her children and their heirs in equal shares; but if any of A.'s children should die after her, but in the lifetime of any husband of hers, without issue, then the share of such child should go to the testator's heirs. A. survived the testator,

¹ Besides the case of *Knapping v. Tomlinson* and the letters in the *Jurist*, mentioned above, *Greenwood v. Roberts* is discussed in *Bell v. Bell*, 13 Ir. Ch. 517; *Marsden, Perp.* 285-286; 1 *Jarm. Wills* (6th ed.) 335-338.

² 8 Rich. Eq. 241.

³ 125 Mass. 536.

⁴ So also *Albert v. Albert*, 68 Md. 352. See *Pleasants v. Pleasants*, 2 Call, 319, 338.

⁵ 8 Gray, 86.

and died leaving two children, one of whom was born before the testator's death. The Court held (1) that dying without issue referred to a definite failure of issue; (2) that the gift over to the testator's heirs should be construed to be to those who should then be the testator's heirs, and was therefore contingent; and (3) that as the contingency might occur at any time in the lifetime of any husband of A., and as such husband might not be born at the death of the testator, the whole gift over was too remote. But as the shares of A.'s children must have been fixed definitely at her death, and as the fate of one did not in any way affect that of the others, they might and ought to have been considered separately; and therefore the gift over of the share of that child of A. who was born in the testator's lifetime, upon the death of such child without issue, was good.

§ 394. In *Lovering v. Lovering*¹ land was devised to trustees in trust to pay the rents to the testator's daughter Nancy for life, and on her death to her children during their lives. "And as the children of said Nancy shall successively decease," the land or its proceeds to be conveyed in fee or paid "to and among the heirs at law of all the children of said Nancy, that is to say, that as said Nancy's children shall successively decease, a proportion of said estate, or the proceeds, are to be conveyed or distributed to and among the respective heirs at law of each child so deceasing, said Nancy's grandchildren to take in right of representation of their deceased parents." Nancy's children were in fact all born in the lifetime of the testator. The Court say: "It is conceded that, if the devise of life estates to the children of" Nancy "would include children born after the death of the testator, the limitation over to the heirs of such children is void for remoteness." And the Court decided, undoubtedly quite correctly, that the devise did include after-born children. But this concession should not have been made. The gifts to the heirs of Nancy's children were not too remote. The shares must have been determined

¹ 129 Mass. 97.

at her death. The heirs of each child took her share, and only her share. Nothing after the death of Nancy in any way affected the amount of any share. The question of remoteness was to be considered with regard to each share separately, and as the children of Nancy were all alive at the testator's death, their heirs were entitled to their shares. But the rights of the heirs were "conceded" away.¹

§ 394 *a*. But in *Dorr v. Lovering*² the same will was again before the Court. Another child of Nancy had died. The Court now held that the gift to its heirs was not too remote. Morton, C. J., who had delivered the opinions of the Court in both *Hills v. Simonds* and *Lovering v. Lovering*, again wrote the opinion. He recognized the error into which the Court had fallen in *Lovering v. Lovering*, and reaffirmed the correct doctrine as to independent gifts which had been laid down in *Hills v. Simonds*.³

§ 395. The same mistake into which the Massachusetts court fell in *Sears v. Russell* and *Lovering v. Lovering* was made by the Supreme Court of Pennsylvania in *Smith's Appeal*.⁴ In that case property was devised by A. in trust to pay the income to B. for life, and after her death as she should by will appoint. B. by her will appointed that the income should be divided among her children, then living, for life, and that "after their several and respective deaths" the share of the principal producing the income of the one dying should be transferred to such person or persons as he or she should by will appoint,

¹ Mr. Crocker, in his Notes on Common Forms (3d ed.) 437, 438, says that in *Lovering v. Lovering* "the rule laid down in *Hills v. Simonds* appears to have been ignored, the opinions in both cases being given by the same judge; it is understood, however, that in *Lovering v. Lovering* the counsel failed to suggest to the court the point decided in *Hills v. Simonds*, and the court, not having the mat-

ter drawn to their attention until after the case had been decided, altered an opinion previously written so as to say, 'It is conceded,' etc., "thus endeavoring to avoid making a decision that should contradict the earlier one."

² 147 Mass. 530.

³ And so in *Minot v. Doggett*, 190 Mass. 435. Cf. *Reed v. McIlvain*, 113 Md. 140; § 245 *h*, ante.

⁴ 88 Pa. 492.

and in default of such appointment over. B.'s children were all born at A.'s death. It was held that the appointment by B. was "wholly void." But the appointment to B.'s children was good, because their interest took effect at her death;¹ any as their shares were then made separate and independent, they were to be treated separately, and the gifts over of the shares of those who were born before A.'s death were good; and as they were all born before A.'s death, the gifts over of all the shares were good.²

§ 395 *a*. In *Thomas v. Gregg*³ A. by will gave his daughter B. a power to appoint by will to one or more of her issue in equal shares. The daughter appointed to her children in equal shares, but directed that the property should be held by trustees and the income of its share paid to each child during its life. At her death she had three children, two of whom were born in the lifetime of A. The Court held that the appointment to the child who was not born in A.'s lifetime was bad for remoteness, and that therefore the appointments to the other children were bad also. This seems a double error.⁴

§ 396. There are two or three other cases in the United States on gifts to classes which call for attention. In *Moore v. Moore*⁵ a testator directed that his property should be kept by his executor as a fund, and added: "Should any of my children, or grandchildren, come to suffering, in any other way, save by idleness, drunkenness, or anything of the kind, so as to become an object of charity, I want the said executor to give a part of this to such child or grandchild." The provision was held void. In order that any child or grandchild should take an

¹ See § 239, *ante*.

² This ruling was also bad for another reason. See §§ 523-523 *b*, *post*. Cf. also *Stephens v. Evans*, 30 Ind. 39. In *Stout v. Stout*, 44 N. J. Eq. 479, Bird, V. C., fell into the same error as was made in the cases stated, §§ 393-395, *ante*; and the like was done, it

would seem, in *United States Fidelity Co. v. Douglas' Trustee*, 134 Ky. 374, 396. Cf. *Lawrence v. Smith*, 163 Ill. 149, stated §§ 249 *e*-249 *g*, *ante*.

³ 76 Md. 169.

⁴ See § 245 *c* (6), *ante*. Cf. *Hillen v. Iselin*, 144 N. Y. 365.

⁵ 6 Jones, Eq. 132.

interest it must come to suffering; this, in the case of a grandchild, might be beyond the required limits. The grandchildren formed one class with the children; the share of each beneficiary might depend upon the number of beneficiaries; this might not be determined till a remote time. Consequently the whole gift was too remote. The decision therefore seems correct.¹

§ 397. In *Goldsborough v. Martin*² property was devised to a trustee in trust to pay the income to H., or to use it, in the discretion of the parties, for the support and maintenance of H.; and in case H. should die leaving issue, "the trust hereby created shall extend to and be executed for said issue in the same manner as directed for and on behalf of" H. The Court held that "issue" embraced all the lineal descendants of H., and that the trust was therefore void. Such a gift would certainly be too remote. But to hold that all the issue of H. would have taken appears to have been erroneous. The issue took as purchasers, and the gift to them did not include any persons who were born after the interest vested in possession.³ There would seem, therefore, to have been here a good gift either of an equitable fee or an equitable life estate to those issue of H. who were *in esse* at her death.⁴

§ 398. So in *Caldwell v. Willis*,⁵ where there was a bequest to A., and after his death to his "child or children then living, and the descendants of such child or children and their heirs forever," the Court, having reached the conclusion that the gift was to all descendants to the remotest generations as a class, naturally held it void as to all; but the construction put on the bequest seems extraordinary, and, entirely apart from any question of remoteness, impossible to carry out.⁶

¹ See *Angell v. Angell*, 28 R. I. 592.

² 41 Md. 488.

³ See *Parker v. Churchill*, 104 Ga. 122.

⁴ See *Bronson v. Strouse*, 57 Conn. 147; *Woodbridge v. Winslow*, 170 Mass. 388. Cf. *Liley v. Hey*, 1

Hare, 580, § 408, *post*, where the decision turned upon the construction given to the word "family."

⁵ 57 Miss. 555.

⁶ In connection with the preceding sections, and on the question how far a series constitutes a class, see the following chapter.

§ 398 *a*. In *Bradford v. Griffin* ¹ A., seised in fee, in 1844, conveyed land to her son John "for life, and after his death to the issue of his body," and, in 1854,² she by deed conveyed to him and his heirs "all her right, title, interest, and estate and reversion" in the land. The son had no issue at the date of the first deed, but had issue who were living at the date of the second deed. He conveyed the land to the plaintiff, who contracted to sell it to the defendant. The defendant objected to the title and the plaintiff brought a bill for specific performance. The Court below said that the first conveyance by A., being by deed and not by will, the son took an estate for life; that if the estates to his issue were valid, they also took estates for life; that Chancellor Kent had said that a limitation to unborn children for life was invalid, and that if this was good law,³ the issue here took nothing; that the limitation here was "to the issue of his body *forever*,"⁴ "that is, through all time to come, each to take an estate for life only. Such a limitation is void for remoteness;" that the consideration was for love and affection and this would not raise a use to unborn issue;⁵ that if the gift to the issue were valid, it was a contingent remainder and so continued even after the birth of children to the son, and was destroyed by the son's life estate merging in the reversion by the second conveyance; and that therefore the son could convey a good title. The Supreme Court held that the son took a life estate; that "a long line of decisions in this State" hold that such words (as issue) are too remote and indefinite to support an estate in lands, where such words occur in a deed executed prior to the act of 1853;⁶ that the

¹ 40 So. Car. 468.

² This date is variously given in the case as 1850, 1854, and 1855, but 1854 seems to be correct.

³ It is not good law. § 232, *ante*.

⁴ According to the passages cited in the opinion of the Supreme Court (there is no statement of

facts) the word "forever" did not occur in this first deed.

⁵ Whatever may be the law as to a bargain and sale, uses can be raised to persons not *in esse* by a covenant to stand seised. § 62, *ante*.

⁶ It is unnecessary to say there had been no case in South Carolina

son had a fee; and that the decree below should be affirmed. This case is submitted to the consideration of the learned reader without comment.

§ 398 *b*. In *Edgerly v. Barker*¹ a testator devised the residue of his estate to his grandchildren when the youngest should reach the age of forty. The Court held that the devise was contingent and as it stood was too remote, but that the intent to give the grandchildren the property was primary, and the intent that they should have it at forty was only secondary; that the latter intent should be sacrificed to the former; and that this should be done by giving the property to the grandchildren when the youngest reached twenty-one. The opinion, which is very elaborate, does not conceal its radical departure from the law as previously held. The vice of the decision seems to be that it substitutes a class consisting of certain persons for the class consisting of other persons for whom the testator provided.²

laying down so extraordinary a proposition. The statute of 1853 (No. 4159) merely declared that "dying without issue" should be construed a definite and not an indefinite failure of issue.

¹ 66 N. H. 434.

² This case is discussed at length in App. G, §§ 857 *et seq.*; and see *Hussey v. Sargent*, 116 Ky. 53, 70; 38 Am. Law Rev. 683, 693.

CHAPTER XI.

LIMITATIONS TO A SERIES.

§ 399. PROPERTY is sometimes given to, or in trust for, the person who, from time to time, may fill a certain position, or answer a certain description. Thus chattels may be given in trust to pay the income to A. during his life, and on A.'s death to such person for life as may be, from time to time, the owner of a certain estate. Here we have a series of life interests to the successive owners, beginning with the death of A. and continuing indefinitely. No one of this series, except the first, can take effect, for every owner, except the first, may not become owner until more than twenty-one years after a life in being. But can the first take? It is certain that his interest will not begin at too remote a period, for it will begin at the death of A. It has been suggested that the whole series form a class, and that unless all can take, none can take. But the reason why one member of a class ordinarily cannot take, where the gifts to other members are too remote, is that the share of one member is dependent upon those of the others, and so long as the shares of some are undetermined they are all undetermined. But in the case we are now considering, the gift to the first taker is entirely unaffected by the question whether the gifts to his successors are good or bad. His interest is affected by them neither in extent nor duration.¹ There seems no good reason why the

¹ In *Mackworth v. Hinxman*, 2 Keen, 658, personalty was bequeathed to Sir G. A., Baronet, for life, and after his death for the person on whom the baronetcy should devolve, so that each baro-

net should take the interest for life. Sir G. died, and Sir J. succeeded him in the baronetcy. Lord Langdale held, "for the purpose of accomplishing the intention," that Sir J. took an absolute interest in

first one of the series should not take. The authorities will now be examined.

§ 400. *Bacon v. Proctor*.¹ Land was devised in trust to pay the rents to, or for the benefit of, such person as for the time being should succeed to the testator's baronetcy, to the end that the estate might be continued in his family, and be enjoyed with the title, so long as the rules of law and equity would permit. It was held by Graham, B., sitting for the Master of the Rolls, that the testator's son and heir took a life estate. Nothing was decided as to the subsequent interests. Lord St. Leonards, who was of counsel in the case, says: "This decision was acquiesced in simply because it was the general opinion of the bar that it could not be disturbed." ²

§ 401. *Deerhurst v. St. Albans*; ³ s. c. *sub nom. Tollemache v. Coventry*.⁴ Lord V., having a peerage in tail male, bequeathed chattels to trustees in trust for A., who was his son and heir apparent, for life, and on A.'s death "for such person as shall from time to time be Lord V.; it being my will and intention" that the chattels shall "from time to time go and be held and enjoyed with the title of the family, as far as the rules of law and equity will permit." A. enjoyed the chattels, and died, leaving a son, B., born before the testator's death, who enjoyed the chattels and died, leaving a son, C., born after the testator's death. C. afterwards died. The question was whether the representatives of B. or of C. were entitled to the chattels. The case was elaborately argued before Vice-Chancellor Leach, who held that as B. was in fact born at the testator's death, the rules of law permitted an interest to be given to C., and the property. Lord St. Leonards questions this decision, and with reason. *Ker v. Dungannon*, 1 Dr. & W. 509, 537, 538. Sugd. Law of Prop. 341, note. See § 407 *a*, note, *post*. As to the cases in which the existence of the Rule against Perpetuities has been allowed to affect construction, see Chap. XIX., *post*.

¹ T. & R. 31. See § 407 *a*, note, *post*.

² Sugd. Law of Prop. 341. See Lewis, Perp. 470-473, 649; Marsden, Perp. 122.

³ 5 Mad. 232.

⁴ 2 Cl. & F. 611; 8 Bligh, N. S. 547.

that therefore C.'s representatives were entitled.¹ An appeal was taken, and was argued before Lord Eldon, C., who never decided it, and then before Lord Lyndhurst, C., who, on the day of his quitting office, affirmed the decree, without giving any reasons.² An appeal was taken to the House of Lords, where, by Lord Brougham (no other law lord being present), the decree was reversed.³

§ 402. Two questions arise on this much-discussed case.

1. Did C. take? 2. Did B. take?

§ 403. 1. Did C. take? Sir John Leach, V. C., held that the limitation to C. was good, because it took effect on the death of B., who was living at the testator's death. But the answer to this is, that A.'s successor might not have been born in the lifetime of the testator, and consequently a gift on the death of such successor might not have taken effect within lives and twenty-one years after the testator's death.⁴

§ 404. Lord Brougham did not bring this out very clearly, but seemed to prefer to rest his opinion overruling the decree on the circumstance that, by means of an attainder, it might happen that after A. no one would be entitled to the peerage for centuries. This argument, as he himself admitted,⁵ is suicidal, for it destroys B.'s claim equally with C.'s; and as Lord St. Leonards⁶ points out, an attainder, "although it would operate as a forfeiture of the dignity, could not render the whole trust void in its creation, but like any subsequent accident, it would affect the rights of the parties." But while the reasons on which Lord Brougham mainly rested in declaring against any right of C. will not bear close examination, the

¹ 5 Mad. 232.

² See 2 Cl. & F. 632.

³ 2 Cl. & F. 611; 8 Bligh, N. S. 547. See *Dungannon v. Smith*, 12 Cl. & F. 546, 630; Sugd. Law of Prop. 335. The remarks attributed to Lord Lyndhurst in 8 Bligh, N. S. 567, are a mistake. He was not present. See 12 Cl. & F. 555,

note (e); Sugd. Law of Prop. 335, note (I).

⁴ See 8 Bligh, N. S. 566, 567; *Dungannon v. Smith*, 12 Cl. & F. 546, 585, 620, 630, 634; Lewis, *Perp.* 469, note.

⁵ 2 Cl. & F. 633.

⁶ Sugd. Law of Prop. 339.

decision on this point seems sound and in full accordance with *Dungannon v. Smith*.¹

§ 405. 2. Did B. take? *Tollemache v. Coventry* has been regarded as deciding that B. did take.² But Mr. Justice Cresswell in *Dungannon v. Smith*,³ and Lord St. Leonards,⁴ point out that the only thing decided was that C. was not entitled, and indeed that Lord Brougham's reasoning would destroy B.'s claim equally with that of C. As has just been said, however, the invalidity of C.'s claim rests upon a reason which is sounder than that given by Lord Brougham, and which does not apply to the interest of B.

§ 406. Why should not B. take as filling the character of first member of a series, the Lords V. succeeding A.? The first member of this series must take on the death of A., and therefore at not too remote a period, although the second and all the later members may take beyond the limits fixed by the Rule against Perpetuities.

§ 407. *Ibbetson v. Ibbetson*⁵ and *Dungannon v. Smith*⁶ are not opposed to this view. In those cases there was a gift to a person who might first come into existence beyond the limits of the Rule. In *Tollemache v. Coventry* there was a gift to a series, the first member of which, if the series began at all, must take within the required time. There was therefore no reason why such first member should not take.⁷

§ 407 *a*. Did B. take a life interest or absolutely? When personalty is placed in trust to go with settled land "so far

¹ 12 Cl. & F. 546. See Sugd. Law of Prop. 339-342; 1 Jarm. Wills (5th ed.) 239-241.

² *Dungannon v. Smith*, 12 Cl. & F. 546, 593, 608. Lewis, Perp. 647, 648.

³ P. 566. But see *In re Hill*, [1902] 1 Ch. (C. A.) 807, 812.

⁴ Sugd. Law of Prop. 333, 336.

⁵ 10 Sim. 495; 5 Myl. & Cr. 26; § 334, *ante*.

⁶ 12 Cl. & F. 546; § 335, *ante*.

⁷ *Tollemache v. Coventry*, in

connection with *Dungannon v. Smith*, is discussed in Sugd. Law of Prop. 330-349. And see Lewis, Perp. 466-470, 647-649, 654-656; Suppl. 49, 50; 1 Jarm. Wills (6th ed.) 343-345; Marsden, Perp. 122, 123; *Ker v. Dungannon*, 1 Dr. & W. 509, 536; *Dungannon v. Smith*, 12 Cl. & F. 546 *et passim*; *Montagu v. Inchiquin*, 23 W. R. 592; *In re Exmouth*, 23 Ch. D. 158; *In re Johnston*, 26 Ch. D. 538.

as the rules of law or equity will permit," every one who takes a life estate in the realty takes a life interest in the personalty until you come to a person in whom vests an estate tail on the realty; such a person takes an absolute interest in the personalty. § 365, *ante*. In *Tollemache v. Coventry*, Lord V., having a peerage in tail male, bequeathed chattels in trust for A., who was his son and heir apparent, for life, and provided that on his death the chattels should "from time to time go and be held and enjoyed with the title of the family as far as the rules of law and equity will permit." The person who after the death of A. held and enjoyed the title held it in tail male, and therefore, in analogy to the above cases, it would seem that he had an absolute interest in the personalty. A. was also tenant in tail male, it is true, but the personalty was expressly limited to him for life.¹

§ 407 *b*. And it has now been settled in *In re Hill*,² where a question precisely similar to that in *Tollemache v. Coventry* arose, that B. took, and took an absolute interest.

§ 408. *Liley v. Hey*.³ A testator devised land to trustees on trust to receive the rents, make certain annual payments thereout, and apply the remainder, if any, as follows: namely, on every December 1 "to distribute amongst certain families, according to their circumstances, as, in the opinion of the said trustees, they may need such assistance, whose names are hereinafter mentioned: viz." A., B., [and twenty-two others]. Sir James Wigram, V. C., held, *first*, that the devise was not for a charity within the Mortmain Act; *secondly*, that it was not void for uncertainty; and *thirdly* (which concerns us here), that it was not void for remoteness. He said: "I incline strongly to think that, upon this will, the persons the testator has named in the will are the objects of his bounty, and that I should only be following the testator's direction, in putting

¹ The decision in *Mackworth v. Hinxman*, 2 Keen, 658, § 399, note, *ante*, was therefore probably wrong. Cf. *Bacon v. Proctor*, T. & R. 31; § 400, *ante*.

² [1902] 1 Ch. 537; [1902] 1 Ch. (C. A.) 807.

³ 1 Hare, 580.

this construction upon the will. But if that were not so, the cases of *Barnes v. Patch*,¹ *Cruwys v. Coleman*,² and *Grant v. Lynam*³ are authorities that the Court can and will put a construction upon the word 'family,' where it may be reasonably done, rather than that a devise should be void. This view of the case disposes of the third objection, at least during the lives of the parties named in the will, who, under a construction to be put upon the word 'family,' might claim an interest under the will, immediately upon the death of the testator. I admit that where a future interest in an estate is so given, that by possibility it may not take effect in possession until a period more remote than the law allows, that devise may be void from the beginning, as tending to a perpetuity. But where the will declares that objects are to take in succession, there is no reason why I should hold the will void, as to those objects to whom an interest not extending beyond their own lives is given immediately at the testator's death."⁴

§ 408 *a*. In *Dillon v. Reilly*⁵ a testator directed the income of £400 to be paid to the clergymen attached to a parish at the time of his death from time to time forever therefrom, on condition of the celebration of masses. Sullivan, M. R., ruled that the income was to be paid to the clergymen attached to the parish at the time of the testator's death, and the survivors and survivor of them; and that on the death of the survivor the £400 should fall into the residue of the testator's estate.⁶

¹ 8 Ves. 604.

² 9 Ves. 391.

³ 4 Russ. 292.

⁴ Cf. *Goldsborough v. Martin*, § 397, *ante*.

⁵ Ir. R. 10 Eq. 152.

⁶ It is doubtful if this case belongs here. The Master of the Rolls appears to have treated the legacy as intended for the clergymen attached to the parish at the time of the testator's death, and

to no others. The case is commented on in *Dorrian v. Gilmore*, 15 L. R. Ir. 69, and *Small v. Torley*, 25 L. R. Ir. 388. In the latter case Porter, M. R. (p. 398), speaking of *Dillon v. Reilly*, says, "It is plain, then, that the Master of the Rolls thought the words 'from time to time forever therefrom' were either insensible and should be rejected, or they were not connected with the gift as a condition

§ 409. *Wainman v. Field*.¹ A testator devised freehold land to A. for life, remainder to B. for life, remainder to B.'s first and other sons successively in tail male, remainders over; and he bequeathed leaseholds to trustees in trust to permit the rents to be taken by such person or persons as should for the time being be entitled to the freehold land until the person so entitled for the time being should, by good assurance, become seised of the said land in fee simple in possession, and then in trust to convey to such person. A. entered into possession of the estate and died. B. brought a bill praying that it might be declared that he was absolutely entitled to the leaseholds. Sir W. P. Wood, V. C., held (1) that B. took only a life interest; (2) that the bequest to the person who should first be entitled in fee simple was void, following *Dungannon v. Smith*; (3) that all interests beyond the life interest of B. were void. There can be no doubt of the correctness of (1) and (2); but as to (3), it seems far from clear. Here was a gift to a series, which began immediately, on the testator's death, with A.; then came B., then the successive tenants in tail. The Vice-Chancellor decided that the gifts to A. and B. were good, but it would seem as if the gift to the first tenant in tail who must take on B.'s death was good also. It is submitted that on this point the case is wrong.²

§ 410. On the whole, when the gift to one member of a series is unaffected by the existence or non-existence of the gifts to the other members, and the gift to such member must take effect, if at all, within the limits fixed by the Rule against Perpetuities, such gift, on reason and authority, is not void for remoteness.³

precedent, and so did not enlarge the previous words; and it can only be on the language of that particular will . . . that he held a life estate and no more to be created."

¹ Kay, 507.

² See *Meller v. Stanley*, 2 De G. J. & S. 183, 192; and cf. *Moore v.*

Moore, 6 Jones, Eq. 132; *Goldsbrough v. Martin*, 41 Md. 488; *Caldwell v. Willis*, 57 Miss. 555; §§ 396-398, *ante*.

³ *In re Hill*, [1902] 1 Ch. 537; [1902] 1 Ch. (C. A.) 807. Cf. *In re Wilmer's Trusts*, [1903] 1 Ch. 874; [1903] 2 Ch. (C. A.) 411.

§ 410 *a*. Suppose property is devised to trustees in trust to pay the income to a class of persons forever (or for a period exceeding twenty-one years). If there be no requirement as to the time when the income shall be paid, as it may not be paid over till a too remote period, the whole trust is void. But suppose there is a direction that the annual income shall be paid over annually to those who on a certain day in each year answer a particular description, e. g. to those who shall then be the heirs of the testator. What then? Such trust is clearly bad as a whole. Is it good for twenty-one years?

§ 410 *b*. In *Siedler v. Syms*¹ the testator gave shares in a bank in trust "during the corporate existence of said bank, either under its present charter or by virtue of any renewals or extensions thereof, to collect the dividends upon the shares," and upon the first days of January in each year to divide them among certain of the persons then in the employ of the bank. The testator died in 1891; the charter of the bank had originally terminated in 1885, but it had been extended to 1905. Stevens, V. C., held that the testator intended the trust to continue during any further renewal and that the trust could not be split.² He then added: "In the present case the court would give more effect to the testator's intention to confer a benefit on the employes (*sic*) of the bank of which he had been so long president; if it declared that the gift was good not only for the fourteen years subsequent to the testator's death (during which it would exist under its present charter), but also for such further period as would, with this fourteen years, make up a term of twenty-one years, than it would if it declared that the gift was valid during the fourteen years only. It would hardly be contended, however, that this could be done. If it could, it might, with equal propriety, have been done in the case of *Detwiller v. Hartman*,³ and in all these cases in which the testator has attempted to create a trust not charitable, to continue indefinitely or for a period beyond the legal one."

¹ 56 N. J. Eq. 275.

³ 37 N. J. Eq. 347.

² As to this see Chap. IX., *ante*.

§ 410 *c.* But ought not this trust to have been held good for twenty-one years? It was a trust for a series of annual payments. The first twenty-one payments must have fallen within a period of twenty-one years. The amount of each payment and its distribution were in no way affected by the existence or non-existence, the validity or invalidity, of any subsequent payment. In *Detwiler v. Hartman*, a bequest to keep the testator's tomb in repair and to employ a brass band to play there on certain days forever was held void, but this is to be supported on a different principle, the want of a *cestui que trust*.¹

§ 410 *d.* The decision in *Siedler v. Syme* seems to be due to the error which we have so often seen creeping in, the failure to bear in mind that the purpose of the Rule against Perpetuities is to prevent the creation of remote future interests, not to prevent restraints upon the alienation of present interests. It is respectfully submitted that the law is correctly given in § 410, *supra*.

§ 410 *e.* It is a great satisfaction to the author that the opinion which he ventured to express in the preceding sections has approved itself to the Supreme Court of Alabama. In *Lyons v. Bradley* ² personal property was bequeathed in trust; the income to be distributed every six months to the persons then constituting a certain class; the trust to exist for twenty-five years, when the principal was to be distributed to a class to be then determined. The Court held that of course the gift of the principal was bad, but they also held that the semi-annual gifts of the income were good for twenty-one years.³

¹ See 15 Harv. Law Rev. 509; App. H, §§ 894, 906, *post*.

² 168 Ala. 505.

³ Cf. *Fitchie v. Brown*, 211 U. S. 321.

CHAPTER XII.

TRUSTS.

§ 411. THE Rule against Perpetuities applies to equitable as well as to legal interests.¹

There are one or two matters which arise in applying the Rule to equitable interests which deserve attention.

§ 412. The mistaken idea that a trust violates the Rule against Perpetuities because it is to last indefinitely has been before discussed,² as has the application of the Rule to cases where trustees have a discretion in selecting the objects to be benefited by the trust;³ and in subsequent chapters will be considered trusts in connection with Estates Tail,⁴ Powers,⁵ and Charities.⁶

§ 413. When an estate is given to trustees, but it is possible that no equitable interest under it may arise within the limits of the Rule against Perpetuities, the whole trust is bad. Thus when a term for a thousand years was given to trustees in trust, upon the alienation of the estate by any tenant in tail, to raise £5,000 out of the estate in favor of certain persons, the trust was decreed to be void.⁷ So when property was given upon trusts to arise when a gravel pit was worked out;⁸ or upon trusts to arise when a parcel of land could be sold at a certain price;⁹ or when mortgages were paid off out of rents.¹⁰

¹ §§ 202, 322-328. In *Speakman v. Speakman*, 8 Hare, 180, no question was made of the validity of the trusts of the fifty years term. Some of them were clearly bad.

² §§ 232-245 *h, ante*.

³ § 246, *ante*.

⁴ Chap. XIV., *post*.

⁵ Chap. XV., *post*.

⁶ Chap. XVIII., *post*.

⁷ *Mainwaring v. Baxter*, 5 Ves. 458. See *Hartson v. Elden*, 50 N. J. Eq. 522.

⁸ *Re Wood*, [1894] 2 Ch. 310; [1894] 3 Ch. (C. A.) 381.

⁹ *Lawrence v. Lawrence*, 4 W. Austr. L. R. 27. Cf. *Kennedy v. Kennedy*, [1914] A. C. 215.

¹⁰ *In re Bewick*, [1911] 1 Ch. 116.

§ 414. When, by reason of an equitable interest being too remote, there is a legal interest vested in trustees, without any corresponding equitable interest, there is a resulting trust to the heir or next of kin.¹

§ 414 *a*. Trustees are owners of the legal estate, and, being owners, they need no other authority or power to enable them to convey the legal estate. The object of creating a trust to sell property or of giving trustees a power to sell is to require or enable them to destroy the equitable estates or interests of the *cestuis que trust* in that property and to enable the purchaser to acquire not only the legal but the beneficial interest. And further, from the point of view of the old or of the new beneficial estate and with regard to the validity of the latter as being or not being too remote, it is immaterial whether the authority to create a new beneficial interest be in the hands of a trustee or in the hands of a stranger to the trust. With regard to the beneficial interests, the trustee and the donee of a power are alike third persons. Trusts to sell and powers in trustees to sell will therefore be considered in connection with Powers.²

¹ See § 327 *a*, *ante*.

² See §§ 487 *et seq.*, *post*. "The Rule against Perpetuities (as is well shown by the case of London and South Western Railway Company *v.* Gomm, 20 Ch. D. 562) prohibits the creation of estates or interests (whether legal or equitable) which may not arise until after the period defined by the rule. A power of sale which is to come into operation at some epoch beyond that period offends against the rule, because it would enable the donee of the power to vest in a purchaser an estate in fee simple after the expiration of the prescribed period. This is obvious where the power is intended to operate under the Statute of Uses by the revocation

of existing, and the creation of new uses; and the like reason appears to hold where the fee simple is vested in trustees, and the power to be executed by a conveyance of that estate; as, for example, where there is a trust to divide between the members of a class, and the trustees are empowered to sell for the purpose of making the division: see *Peters v. Lewes and East Grinstead Railway Company*, 18 Ch. D. 429. It was, therefore, rightly admitted at the bar that if in the present case there had been a power instead of a trust for sale, that power would have been invalid. There is, however, no substantial difference, for the purpose of the rule against perpetuities, between

§ 415. A devise contingent on the payment of the testator's debts is too remote, for it is uncertain when the debts will be paid. It is important to see how this affects gifts connected with, or subject to, trusts for the payment of debts. If a term is given to trustees to pay debts, and, subject to the term, the property is devised to A., A.'s estate is vested, and like all vested interests, is not obnoxious to the Rule against Perpetuities.¹ If, however, the fee is given to trustees to pay debts, and, subject to the payment of debts, the land is devised to A., here, at law, A. has an executory devise which is bad for remoteness.² But, in equity, the trustees are regarded as holding in trust for A., with a charge for the payment of debts, so that A. has an immediate equitable fee, which is, of course, not too remote.³

§ 416. If the intention is clear that no interest, legal or equitable, is to vest until the debts are paid, then any such interest will be too remote. But it would require the most unmistakable language to postpone the vesting of a gift, after a trust for payment of debts, until the debts were paid.⁴ As

a trust for sale and a power of sale, where the sale is intended to be completed by a conveyance to the purchaser of the legal estate vested in the trustees. A testator or settlor cannot (as I think) impose an obligation to sell where he cannot lawfully confer a power to do so; or escape from the rule against perpetuities by vesting in his trustees an imperative instead of a discretionary power of sale." *Per* Stirling, J., in *Goodier v. Edmunds*, [1893] 3 Ch. 455, 460, 461.

¹ 2 Lewis, *Perp.* 622, 623. *Third Rep. Real Prop. Comm.* 35.

² Lewis, *Perp.* 623-638. See *Bagshaw v. Spencer*, 1 Ves. Sr. 142, 144; *Challis, Real Prop.* (3d ed.) 259. Cf. § 37, *ante*.

³ *Bacon v. Proctor*, T. & R. 31,

40. *Morgan v. Morgan*, 20 R. I. 600. *Re Mountain*, 26 Ont. L. R. 163. Lewis, *Perp.* 626-632. 2 *Fearne, C. R.* (Powell's ed.) 282-299, note. 1 *Collect. Jurid.* 214. 1 *Jarm. Wills* (6th ed.) 316, 368, *Addenda*, cccvi. § 676, *post*. On the question whether trustees to pay debts take, in any particular case, the fee or only a chattel interest, see *Carter v. Barnardiston*, 1 P. Wms. 505, 509; *sub nom.* *Barnardiston v. Carter*, 3 Bro. P. C. (Toml. ed.) 64; 2 *Jarm. Wills* (4th ed.) 296-299, 310-314; (6th ed.) 1384, 1839; *Hawkins, Wills* (2d ed.) 187-189; *Lewin, Trusts* (10th ed.) 228.

⁴ See an article by Mr. Kales on the remoteness of limitations "when debts are paid," 6 *Ill. Law Rev.* 373.

the land of a deceased person can now be taken for his debts in England as well as in America, trusts created by will for the payment of debts are not so necessary nor so common as formerly. The application of the Rule against Perpetuities to Mortgages and Sinking Funds is considered in Chap. XVI. *post.*

§ 417. In *Massy v. O'Dell*¹ A. conveyed Blackacre to B. in fee, with a covenant for quiet enjoyment free from quit rent and Crown rent, and on the same day conveyed Whiteacre to trustees in trust to let A. take the rents until B. and his heirs had to pay quit rent and Crown rent on Blackacre, and then in trust to raise money to pay off those charges, Smith, M. R., held that this last trust was not too remote. He sustained himself by citations from Lewis on Perpetuities,² to the effect that where land is devised to trustees for the payment of debts, the persons to whom the land is given after payment of debts take an equitable fee. But the cases do not seem analogous. Where land is devised for payment of debts, there is an immediate equitable fee in favor of those who are to take subject to the debts, and there is also an immediate charge for payment of the debts; but in *Massy v. O'Dell*, while there was an immediate trust in favor of the settlor, the trust to indemnify B. and his heirs only arose if he or they were subjected to the payment of rent, which might first happen at a remote period. It is submitted that *Massy v. O'Dell* was wrongly decided. Lord St. Leonards³ says: "In exchanges, by a conveyance operating under the statute, it has been sometimes attempted, in case of eviction, to limit the other estate to the uses to which the estate evicted should stand limited at the time of the eviction; but such provisos are clearly void if considered as creating shifting uses, because they are too remote."

§ 418. In executing an executory trust the Court will of course avoid limitations which run counter to the Rule against

¹ 10 Ir. Ch. 22.

³ Sugd. Pow. (8th ed.) 44.

² Pp. 626, 631.

Perpetuities, just as it would any other illegal provisions. The presumed intention of the testator or settlor to have his arrangements legal and valid will overrule any expressions of a contrary tendency.¹ If the main object of an executory trust were to create too remote limitations, so that apart from such object there remained nothing substantial to carry out, it is probable that the whole trust would fail, although there is no case so holding.²

§ 419. This seems the best place to consider *Tregonwell v. Sydenham*,³ a case of extraordinary difficulty. A testator gave his X. estate to his only son A. for life, remainder to A.'s sons and daughters successively in tail, with remainders over; and his Y. estate to A. for life, remainder to A.'s sons successively in tail male, remainder to B. for life, remainder to B.'s sons successively in tail male, remainders over. The Z. estate he devised in like manner as the Y. estate, except that after the remainder to the sons of A. successively in tail male, and before the remainder to B. for life, was a devise to trustees for sixty years in trust to receive the rents and profits, until they should have received £17,500, which they were to apply as follows: when they should have £2,500, to lay out the same, with any interest they should have made therefrom, in land, and settle the land on such person for life as should then be in possession of the X. estate; or in case, by suffering a recovery or otherwise, the X. estate should be in other hands,

¹ On the mode of carrying out executory trusts so as to avoid the objection of remoteness, see *Newcastle v. Lincoln*, 3 Ves. Jr. 387; *sub nom.* *Lincoln v. Newcastle*, 12 Ves. 218; *Dorchester v. Effingham*, 10 Sim. 587, note; 3 Beav. 180, note; *Woolmore v. Burrows*, 1 Sim. 512; *Banks v. Le Despencer*, 10 Sim. 576; 11 Sim. 508 (the settlement in this case is given more fully in 7 Jur. 210; *Lewis, Perp. App.* 32); *Scarsdale v. Curzon*, 1

J. & H. 40, 51; *Lyddon v. Ellison*, 19 Beav. 565; *Holmesdale v. West*, L. R. 3 Eq. 474; *sub nom.* *Sackville-West v. Homesdale*, L. R. 4 H. L. 543; *Shelley v. Shelley*, L. R. 6 Eq. 540; *Harris v. Carruthers*, 2 N. S. Wales State Rep. 100, 117; *Lewis, Perp. c.* 27, pp. 574–589; *Suppl.* 173, 204, 205; *Marsden, Perp.* 133–139; 3 *Dav. Prec. Conv.* (3d ed.) 601, 602; § 365, note, *ante*.

² *Lewis, Perp.* 584, 585.

³ 3 *Dow*, 194.

then on such person as would have been in possession had such recovery or other proceeding not been had; and so, from time to time, as soon and as often as the further sum of £2,500 should be raised, the same should be laid out and settled in like manner, with such remainder that on each of said settlements the estates should be so settled as to continue in the blood of the S.'s; and after raising the £17,500, then in trust to raise and apply in like manner £2,500 in trust to be settled in like manner on the persons entitled to the Y. estate.

§ 420. A. entered upon the estates and died, leaving no son, but leaving his grandson C., the child of his daughter, as his heir general and the heir general of the testator. C. was entitled to estate X. as tenant in tail; but as he claimed through a female, he was not entitled as tenant in tail male to Y. or Z., and B. became entitled for life to Y. and, subject to the term for sixty years to trustees, also to Z. C. was not born till after the testator's death. B. and his eldest son then brought a bill praying that the trusts of the term might be declared void, and that the trustees might be declared to hold it and directed to convey it for the benefit of the plaintiffs. The Court of Exchequer made a decree accordingly, and C. appealed. The House of Lords (Lords Eldon, C., and Redesdale) reversed the decree, and declared "that, in the events which have happened at the time of failure of issue male of the body of the testator, such of the uses [to] which the testator by his will directed, the estates so to be purchased should be conveyed, as would otherwise have been capable of taking effect, were too remote, and therefore void; and that therefore the trusts of the real estates, directed by the testator's will, to be purchased with the said two sums of £17,500, and £2,500, resulted to the heir at law of the testator, as undisposed of by the testator's will."¹ The House of Lords and the Court of Exchequer agreed that the trusts upon which the land to be purchased was to be held were too remote, but they differed as to the consequence of the invalidity. The Court of Exchequer thought the term should

¹ 3 Dow, 217.

sink for the benefit of the devisee; the House of Lords thought there was a resulting trust for the heir. Several points are to be noticed.

§ 421. (1) It was first suggested by the devisees that the legal estate of the trustees was bad, because it was not to begin until the expiration of the estates tail male limited to A.'s sons.¹ But this objection was overruled, and was clearly unsound; as a recovery by any one of A.'s male issue, tenants in tail, would have destroyed the term, it could not be too remote.²

(2) The Court of Exchequer considered that the trusts of the term were void *ab initio*. Lords Eldon and Redesdale were of the opposite opinion, but they thought, even had the trusts been void *ab initio*, there would still have been a resulting trust to the heir.³

(3) It would seem to have been the intention of the testator that each £2,500 accumulated should be settled for life on the person who was entitled to the estate when the accumulation was finished. As the accumulation might not be finished till a remote period, such a trust would be wholly void. This was perhaps the view taken by the Court of Exchequer.

(4) The difficulty lies here. Why did the House of Lords refuse to consider the trusts of the term as void *ab initio*? Was it because the trust to accumulate was valid until stopped by the person entitled to the equitable fee, whoever that might be? Or was it because the trust was to be executed at the termination of the estate tail, and it might then have been executed in persons whose interest would not have been too remote?

(5) It seems almost impossible that the House of Lords took this latter view. The will says distinctly that as each £2,500 is raised, the trustees are to lay it out in land "and at the same time to settle the same" on such person "as should

¹ 3 Dow, 201, 202.

² 3 Dow, 202, 215; § 448, *post*.

³ 3 Dow, 205, 206, 210, 215, 216.

See 1 Jarm. Wills (6th ed.) 439, 722.

then be in possession" of the X. estate. The execution of the trust and the designation of the person to take seem, by the clearest language, to be postponed until the accumulation has been effected and are therefore too remote altogether. The counsel for the defendants say:¹ "This point was but little relied upon below by the other side;" and both Lord Eldon and Lord Redesdale held that it was immaterial whether the trusts were void *ab initio* or not, for that in neither case were the plaintiffs entitled.

(6) But it must be admitted that the language of the law Lords is somewhat ambiguous,² and so are the remarks of Lord St. Leonards³ and of Mr. Lewis.⁴ Mr. Marsden⁵ says, it seems to have been the effect of the direction to convey that "the money was given to trustees in trust to be applied in the purchase of lands, which were to be conveyed to the use of the person for life who should, upon failure or expiration of the estate tail, be in possession of certain other settled estates."

§ 422. The important proposition to be extracted from *Tregonwell v. Sydenham*, according to Mr. Lewis and Mr. Marsden, is this: An executory trust is invalid unless its execution must take place, if at all, within twenty-one years after lives in being.⁶ But if it must be executed within that time it is good, so far as it can, according to its terms, be executed in favor of objects not too remote from the date of its creation. The possibility that it may not be capable of such execution does not render it wholly void. As has been said,⁷ it is doubtful if this proposition can claim in its support the authority of the House of Lords, but there seems to be no reason to question its correctness, and it has now been so held. *In re Fane*.⁸

¹ 3 Dow, 202.

² 3 Dow, 205, 215.

³ Sugd. Law Prop. 326 *et seq.*, 362.

⁴ Lewis, Perp. 586 *et seq.* See also 1 Jarm. Wills (6th ed.) 439, 722.

⁵ Perp. 136.

⁶ Or immediately on the termination of an estate tail. See Chap. XIV., *post*.

⁷ See § 421 (5), *ante*.

⁸ [1913] 1 Ch. (C. A.) 404.

§ 422 *a*. Here, perhaps, is the fittest place to note the decision that if property is devised on several trusts, some of which are too remote, the trustee will take only such estate as is necessary to carry out the valid trusts.¹

¹ Doe d. McDonnell *v.* McIsaac, Hasz. & Warb. 353; Peters (P. E. I.) 236. In the United States it has commonly been held, though such decision seems against principle,

that a trustee takes only the estate necessary to carry out the trust, even when the trust is created by deed and not by will.

CHAPTER XIII.

MODIFYING AND QUALIFYING CLAUSES.

§ 423. ALTHOUGH the construction to be put upon an instrument is not affected by the existence of the Rule against Perpetuities,¹ yet when there is a good absolute gift, and the settlor or testator goes on, in an additional clause, to modify the gift, and, by modifying it, makes it, in part, too remote, the modification is rejected *in toto*,² and the original gift stands. Thus if land is devised to an unborn child in fee, and by a subsequent clause of the will the testator directs that the land so devised shall be settled on such child for life, remainder to its children in fee, which remainder is void for remoteness, the whole modifying clause is disregarded, and the child takes a fee simple. "The particular ground on which the construction in question is rested is, that the author of the limitations intends the prior absolute gift to prevail, except so far only as it is effectually superseded by the subsequent qualifying one."³ Mr. Lewis suggests⁴ a doubt how far this treatment can be applied to provisions in deeds, but it seems unlikely that any distinction between deeds and wills would be made at the present day.

¹ See Chap. XIX., *post*.

² But see §§ 430 *a*, *et seq.*, *post*.

³ Lewis, Perp. 535. See Lewis Perp. c. 24; 1 Jarm. Wills (6th ed.) 361-362; Marsden, Perp. c. 14. A precisely analogous class of questions presents itself in the execution of powers. When, for instance, the objects of a power are confined to children, and it is executed by

appointing to a child, and then the donee of the power adds that the property so appointed shall be settled on the child for life, remainder to its children, this additional clause is rejected, and the child takes the absolute interest. Cases thus arising in the execution of powers are directly applicable to questions of remoteness.

⁴ Perp. 540.

§ 424. The first case in which a modifying clause was so dealt with was *Arnold v. Congreve*¹ (1830). There a testatrix by her will gave legacies to her grandchildren. By a codicil she directed that the share of each grandchild should be settled on it for its life, and afterwards on its children. Sir John Leach, M. R., held that the limitations to the great-grandchildren were too remote, and that "the intention of the testatrix would be best effectuated by holding that the absolute interests given to the grandchildren by the will were not destroyed by the codicil."²

§ 425. In *Carver v. Bowles*³ (1831) a testator, having power by his marriage settlement to appoint by will a trust fund to such one or more of his children, "at such time or times, in such shares, proportions, manner, and form, and with, under, and subject to such powers, provisos, conditions, restrictions, and limitations over (such limitations over to be for the benefit of some one or more of such children, or his, her, or their issue)" as he should choose, did, by will, "appoint, give, and bequeath" the fund to his five children, equally to be divided between them; and declared, "so far as I lawfully or equitably may or can," that the shares of the daughters should be held for themselves for life without power of anticipation, and on their death to go to their issue. The gift to the issue was bad for remoteness;⁴ and it was held by Sir John Leach, M. R., that the daughters took an absolute interest in the property appointed, and not a life estate.⁵

¹ 1 Russ. & M. 209.

² As all the grandchildren of the testatrix were alive at her death, the gifts to the great-grandchildren were not too remote, and on this point the case has been overruled. See § 389, *ante*.

³ 2 Russ. & M. 301, 304, 307, 308.

⁴ In the case itself, p. 307, the appointment to the issue of the daughters is said to have been bad,

because such issue were not objects of the power. But this is a mistake; the issue were objects of the power, — it was for remoteness that the gift to them was bad. See *Lewis, Perp.* 535.

⁵ The words, "so far as I lawfully or equitably may or can," may have influenced the decision. (*Cf. Church v. Kemble*, 5 Sim. 525.)

As to the restraint on anticipa-

§ 426. In *Kampf v. Jones*¹ (1837) a testatrix, having power to appoint a fund of personal property to her children or remote issue born in her lifetime, "subject to such conditions, with such restrictions, and generally in such manner" as she pleased, by will appointed that the fund "should go and be divided between" her children A., B., C., D., and E.; and she directed that the share of E., who was not then married, should be vested in the trustees of the will in trust for E. for life, and on her death for her issue. It was held that the gift to the issue of E. being bad, the whole modification ought to be rejected, and that E. took an absolute interest.² Here the modifying clause was bad, because the issue of E. were not objects of the power, not being born in the lifetime of the testatrix.³ Whether, if within the power, the gift to them would have been too remote would have depended upon whether E. was alive at the creation of the power, which does not appear.

§ 427. In *Ring v. Hardwick*⁴ (1840) a testator directed his trustees to make a division of all his personal estate between all and every of his children, viz. his two sons and his two daughters; the division to be equal, share and share alike, the shares of his sons to be paid to them, "but as touching and concerning the shares of my said personal estate which will become the property of my said daughters," the share of each daughter was to be invested in the names of trustees, in trust to pay the income to her during her life, and on her death to her children, to become vested in them respectively at twenty-five, with gifts over in case any of such children died under twenty-five. Lord Langdale, M. R., said: "I think that there is sufficient to be collected from the prior words in this will to give an absolute interest to the daughters; and those prior words are so connected with what follows

tion by the daughters, see § 433, *post*.

¹ 2 Keen, 756.

² See *Lassence v. Tierney*, 1

Macn. & G. 551, 567, 568; 2 H. & Tw. 115, 131; Lewis, Perp. 536.

³ § 423, note, *ante*.

⁴ 2 Beav. 352.

as to show that the testator intended a restriction of that absolute interest; and the restriction not having become effectual, the whole interest remained according to the original gift."

§ 428. Several later cases to the same effect are given in a note.¹

§ 429. In *Sears v. Putnam*² a testator gave his property to and amongst his nephews and nieces (children of his deceased sisters), and directed that the portion of each niece should be held in trust for her during the term of twenty-five years from his death, the income payable to her; on her death her portion of the income to be paid to her children, if any, otherwise to the remaining *cestuis que trust*, during said term; at the end of said term the capital to be paid to her, or, if she be dead, to her children; and should she die leaving no child surviving at the end of said term, her share to go to any surviving nieces, and to the children of any who should previously have died. It was held that the limitations over being void for remoteness the whole provisions concerning the trust should be disregarded and that the nieces took absolute interests.

§ 430. In *Slade v. Patten*³ a similar course was pursued with provisions declared by the Court to be remote; but as there was in truth no remoteness, the provisions were unobjectionable.⁴

¹ *Harvey v. Stracey*, 1 Drew. 73, 139, 140. *Stephen v. Gadsden*, 20 Beav. 463. *Gerrard v. Butler*, Id. 541. *Courtier v. Oram*, 21 Beav. 91. *Churchill v. Churchill*, L. R. 5 Eq. 44. *Sondes' Will*, 2 Sm. & G. 416. *Cooke v. Cooke*, 38 Ch. D. 202. *Re Boyd*, 63 L. T. R. 92. *Dowglass v. Waddell*, 17 L. R. Ir. 384. *In re Stewart*, [1907] S. Aust. L. R. 1. *Trustees' Co. v. Jenner*, 22 Vict. L. R. 584. *O'Brien's Estate*, 24 Vict. L. R. 360. *Re Phillips*, 28 Ont. L. R. 94. 1 Jarm. Wills (6th ed.) 361, 362.

See *Gompertz v. Gompertz*, 2 Ph. 107; *Goodier v. Johnson*, 18 Ch. D. 441; *In re Hancock*, [1901] 1 Ch. (C. A.) 482; *sub nom. Hancock v. Watson*, [1902] A. C. 14; *Re Russell*, [1895] 2 Ch. (C. A.) 698; *Security Co. v. Snow*, 70 Conn. 288; *Cain v. Watson*, [1910] Vict. L. R. 256, 276. Cf. *In re Dameron* [1893] 3 Ch. 421.

On election in such cases, see §§ 541 *et seq.*, *post*.

² 102 Mass. 5.

³ 68 Me. 380.

⁴ § 235, *ante*. See *Pennsylvania*

§ 430 *a*. A question of some difficulty may arise. The case generally presented is in this form: an absolute gift to an unborn person, and a modification giving a life interest to him, with a gift over on his death, which is void, because too remote. Here the unborn person takes the absolute interest. Suppose, however, there is a bequest to A. absolutely, and a modification, by which the estate is given to A. for life, on his death to his eldest child, now unborn, for life, and on the death of such eldest child on a remote limitation. Does A. have an absolute interest, or is there a gift to A. for life, then to A.'s son for life, and then a reversionary gift to A.?

§ 430 *b*. In *Cooke v. Cooke*¹ a marriage settlement gave the survivor of the intended husband and wife power, by deed or will, to appoint among children. The husband survived, and by will appointed among his three daughters equally, with a proviso that each daughter's share should be held on trust for her for life, and on her death, should she die leaving issue, as she should appoint, and in default of appointment or in case she should not leave issue, on corresponding trusts for the other daughters. A daughter sought a declaration that she was entitled to one-third of the appointed property absolutely. The counsel on both sides and the Court seem to have assumed that although the ultimate limitations were too remote, the contingent life interests given to the other daughters were *in themselves* good. The counsel for the plaintiff said: "It is clear that the limitation contingently cutting down the plaintiff's absolute interest, so far as it attempts to give her a power of appointment, is void. We submit that the contingent life interests given to the other two daughters are so mixed up with a disposition that is void for remoteness that they fail also." The counsel for the defendants said: "As to the exercise of the power, the limitation over is good, so far as it does not offend the Rule against Perpetuity. The contingent life interests given to the other daughters of the testator

Co. v. Price, 7 Phila. 465; § 237 *a*, ¹ 38 Ch. D. 202.
ante.

in case Miss Cooke [the plaintiff] leaves no issue, are separable from the bad part of the appointment, and will in that event take effect." North, J., in his opinion said: "It is not disputed that the effect of the [proviso] would be to tie up the shares longer than the Rules against Perpetuity allow. That being so, what becomes of the property in the case of the plaintiff's share: is it undisposed of, or do the trusts given of the other children's life interest take effect, or does the gift to the three in equal shares and proportions prevail, so that she gets her share absolutely? In my opinion that is the construction that is to have effect. . . . The rule, as I understand it, is that where there is an absolute gift followed by an attempt to limit the effect of that gift, which limitation for some reason cannot take effect, the original gift will take effect." The authority of this case, it must be admitted, is weakened by the fact that the assumption on which every one went seems to be wrong. The original power was a special one, and therefore the interests given for life to persons unborn at the creation of the original power, on the contingency of the death without issue of a person also then unborn, were themselves too remote.¹

§ 430 c. On the other hand, in *Smidmore v. Smidmore*² a testator in his will gave real estate to trustees in trust for his son absolutely. By a codicil he cut down the son's interest to a life estate determinable on alienation, in which event the income during the son's life was to be paid to those who would have been entitled if the son were then dead, with a discretionary power to the trustees to pay the income to the son's wife during the rest of his life. The remainder, on the son's death, was held by the Court to be void either as uncertain or as too remote, but that the power was valid. The authority of this case, again, is weakened by the fact that on appeal the

¹ This seems to have been what was held in *United States Fidelity Co. v. Douglas' Trustee*, 134 Ky. 374, 399.

² 5 N. S. Wales State Rep. 492.

High Court of Australia¹ thought that if the ultimate remainder was void, the decision of the Court below as to the power was correct, yet that the ultimate remainder was neither uncertain nor remote, so that the whole modification could stand as valid.²

§ 430 *d.* In *Harvey v. Stracey*³ a direction in the modifying proviso that the interest of a woman who was the legatee should be for her separate use was retained, although she was given the absolute interest. But this does not appear to have been done in any of the other cases.⁴

§ 431. In order, however, to apply this rule of rejecting modifications which are too remote, there must be an absolute gift independent of the modifications. Thus in *Whitehead v. Bennett*⁵ a testator directed that all his property should be sold and "invested for the benefit" of his three daughters, "and the interest thereof to be paid to each of my said daughters during their respective natural lives, without the control of their husbands, and on the decease of each of them" he directed "that one-half of the fund or share from which interest or the income thereof is hereby directed to be paid to the parent respectively for life as aforesaid, shall be paid to the children of each of my daughters so dying, equally, at the age of twenty-one years," and "that the interest of the other half shall be paid to the children of each of my daughters for their respective lives, and on the decease of my said grandchildren respectively the share of which they, my said grandchildren, are only to receive the interest thereof for life as

¹ 3 Commonwealth L. R. 344.

² Cf. *In re Hancock*, [1901] 1 Ch. (C. A.) 482, 498; *sub nom. Hancock v. Watson*, [1902] A. C. 14, 22.

³ 1 Drew. 73, 139, 140.

⁴ And see *Sears v. Putnam*, 102 Mass. 5, 9. Cf. *Gompertz v. Gompertz*, 2 Phil. 107, where Cottonham, C., distinguishes between those cases where there was a gift,

and then a direction as to the manner in which the legacy was to be invested, and applied for the benefit of the legatee, and those cases where there was "not a diminution or qualification of the original gift, but merely a direction as to the mode in which it was to be dealt with and enjoyed."

⁵ 22 L. J. Ch. 1020.

aforesaid, to be paid to their children respectively when and as they attain" twenty-one years. The limitation to the great-grandchildren being void,¹ it was contended that the daughters took absolute interests; but *Kindersley, V. C.*, held otherwise, and that they took only life interests.²

§ 432. Another class of cases in which a modifying clause has been rejected is presented by settlements on married women, with a clause against anticipation. A life interest may be given to the unborn daughter of a living person, because the whole interest must vest, and the daughter have an estate free from any condition, within the required time. Suppose, however, that there is a clause against anticipation attached to the estate.

§ 433. The course of decision has been as follows: In *Carver v. Bowles*³ (1831) Sir John Leach, M. R., held that a clause against anticipation attached to a gift, under a power, to a daughter unborn at the date of the settlement containing the power, was good; but the only point discussed was whether the power allowed anticipation to be restrained; the question of remoteness was not alluded to in this connection.⁴ In *Thornton v. Bright*⁵ (1836), under a power in a marriage settlement to appoint to the children of the marriage, Lord Cottenham, C., held that an appointment to trustees for the separate use of a daughter was good. The appointment directed that the daughter should have no power of anticipation. In the arguments, nothing was said about this clause and the Chancellor does not appear to have passed upon its validity. In *Dickinson v.*

¹ It appears from the case that some at least of the testator's grandchildren were living at his death; that being so, it would seem that the gifts to their children would, in accordance with *Cattlin v. Brown*, 11 Hare, 372, and the like cases, § 389, *ante*, have been good. This does not seem to have been observed in the books.

² See *Lassence v. Tierney*, 1

Macn. & G. 551; 2 H. & Tw. 115; *Reid v. Reid*, 25 Beav. 469; *In re Crawshay*, 43 Ch. D. 615; *King v. King*, 13 L. R. Ir. 531; *Graham v. Whitridge*, 99 Md. 248, 277. Cf. § 880, *post*.

³ 2 Russ. & M. 301, 303, 307, 308.

⁴ § 425, *ante*.

⁵ 2 Myl. & Cr. 230.

*Mort*¹ (1850) the same question arose as in *Thornton v. Bright*, and the appointment to separate use, with a clause against anticipation, was held good; but here again the question of remoteness did not occur to court or counsel.

§ 434. In *Fry v. Capper*² (1853) Wood, V. C., held that an appointment like that in *Thornton v. Bright* was good, notwithstanding there was a clause against anticipation. All that he had to decide was that the appointment was good; but he strongly intimated that the clause against anticipation was bad for remoteness, and must be rejected.³ In *Armitage v. Coates*⁴ (1865) Lord Romilly, M. R., gave it as his "strong impression" that such a clause would be too remote; but he "expressed no opinion" on it, and determined the case on a ground which made the decision of the question unnecessary.

§ 435. In *Re Teague's Settlement*⁵ (1870) Vice-Chancellor James held that a clause against anticipation attached to an estate given to an unborn child should be disregarded. This was the first time that the point had been distinctly determined. The same question was decided in the same way by Malins, V. C., in *Re Cunynghame's Settlement*⁶ (1871).

§ 436. In *Re Ridley, Buckton v. Hay*⁷ (1879), Jessel, M. R., followed the cases cited in the two preceding sections, but reluctantly, thinking them wrongly determined. He argued that the restraint on anticipation was an exception to the whole law, including the Rule against Perpetuities; that it was not merely an exception to the rule allowing free alienation, "but an exception along the whole line, so to speak."⁸

§ 437. *Hodgson v. Halford*,⁹ as is remarked by Mr. Marsden,¹⁰ seems to have presented the question, but it was not con-

¹ 8 Hare, 178.

² Kay, 163.

³ See 3 Jur. N. S., pt. 2, 213, for an article on *Fry v. Capper* and the earlier cases.

⁴ 35 Beav. 1.

⁵ L. R. 10 Eq. 564.

⁶ L. R. 11 Eq. 324. §§ 432-435

have been taken substantially from the author's treatise upon Restraints on Alienation (2d ed.), §§ 272-272 c.

⁷ 11 Ch. D. 645.

⁸ P. 651.

⁹ 11 Ch. D. 959.

¹⁰ Perp. 281, 282, note (o).

sidered. In *Cooper v. Laroche*¹ Malins, V. C., adhered to his opinion in *Re Cunynghame's Settlement*,² although he thought that the question did not arise in *Cooper v. Laroche*.³ And restraints on anticipation attached to life estates given to unborn persons have been held invalid also in *Re Boyd*,⁴ *In re Game*,⁵ and *Trustees Co. v. Jenner*.⁶

§ 437 *a*. In the first edition of this treatise the series of late English decisions, from *In re Teague's Settlement* to *Cooper v. Laroche*, was believed to give the law correctly, and the disapproval of the doctrine of these decisions by Jessel, M. R., was commented on unfavorably, but further consideration has led to the conclusion that the criticism of the Master of the Rolls, though it might have been more clearly expressed, was sound, and that the doctrine of those decisions cannot be supported. They seem, in fact, to be offsprings of that fertile source of error, the confusion between remoteness and restraints on alienation.⁷ To prevent the taking of property out of commerce there are two rules. *First*, that interests must vest within a certain time; *second*, that after they have vested, they must be alienable; and the two rules are independent. An estate which must vest within the required limits, for instance an estate for life to the child of a living person, complies with the Rule against Perpetuities. If there is an attempt to restrain the child from alienating the estate, the validity or invalidity of that attempt must be determined with reference to the character of the estate itself, for instance, whether it is to a married woman, and has nothing to do with the time the interest begins.

§ 437 *b*. The soundness of Sir George Jessel's conclusion is

¹ 17 Ch. D. 368.

² L. R. 11 Eq. 324; § 435, *ante*.

³ The question did arise; § 215 *a*, *ante*. See Gray, *Restraints on Alienation* (2d ed.) 272 *f*; Marsden, *Perp.* 281-283. See also *Re Michael's Trusts*, 46 L. J. Ch. 651; *Herrbert v. Webster*, 15 Ch. D. 610; *Re*

Russell, [1895] 2 Ch. 698; § 441, *post*.

⁴ 63 L. T. R. 92.

⁵ [1907] 1 Ch. 276.

⁶ 22 Vict. L. R. 584. See *Tarrant v. Backus*, 63 Conn. 277.

⁷ See Challis, *Real Prop.* (3d ed.) 192, note; 1 Jarm. *Wills* (6th ed.) 305, 306, 363.

obscured by his speaking of the allowance of the restraint against anticipation as an "exception" to the Rule against Perpetuities. It is not an exception to that rule, it has nothing to do with the Rule, it is the result of an independent rule, i. e. that married women can be restrained from alienating their estates.¹ The true doctrine is believed to be that a future estate, not in itself too remote, can be subjected to the same restraints to which a present estate can be subjected.²

§ 438. Restraints against anticipation are lawful only when attached to the separate estates of married women; but where statutes, as in New York, or local usage, as, for instance, in Pennsylvania and Massachusetts,³ allow them to be attached to the estates of men or of single women, the same principles should govern, — that is, the same restrictions which are good on present estates should be held good on future estates.⁴

§ 439. The cases hitherto considered have been (1) when there has been an absolute gift, which has afterwards been modified into a life estate, and a remote remainder; (2) when there has been a good estate, with a clause against anticipation. But there seems no reason why the principle should be considered only in connection with such cases. It might be applied where a gift is made in trust for a class of unborn persons, and then a discretion given to trustees to distribute the income in such proportions as they see fit, or to add it to the capital.⁵ To apply the principle, however, the clause giving the trustees discretion must be separate from the gift.⁶

¹ For an argument in favor of the doctrine of the late English cases, see the first edition of this treatise, §§ 432, 436; the author now believes that such argument cannot stand.

² Mr. Charles Sweet, in 18 Jur. Rev. 132, 143, says: "It is not easy to see any answer to this argument."

³ § 119, note, *ante*.

⁴ See *Gardette's Estate*, 13 W. N. C. (Pa.) 315; 16 Phila. 264; § 240, *ante*. Cf. *Smith's Appeal*, 88 Pa. 492; § 239, note, *ante*. As to restraints on anticipation attached to fees simple or to absolute interests in personalty, see § 442, *post*.

⁵ See *In re Blew*, [1906] 1 Ch. 624; §§ 232, 246, *ante*; 1 Jarm. Wills (6th ed.) 308.

⁶ See § 431, *ante*. On provisions

§ 440. In *Webb v. Sadler*,¹ under a power in a marriage settlement to appoint to children, property was appointed to a son for life, and to such trusts as he should by deed, with the consent of certain persons, or by will, appoint. Counsel contended that within the principle of the foregoing cases the clause requiring consent might be stricken out, and that the power given to the son would then be good, as he would have an immediate power of disposition. But Bacon, V. C., and, on appeal, the Court of Appeal in Chancery, held the appointment bad. Lord Selborne, C., said: "We all think it (the consent) is an inseparable condition of the exercise of the power. There is no analogy between the effect of such a clause and the cases where there is a separate and superadded condition after the gift of an estate. Here there is no power except with consent."²

§ 440 *a*. A will gave power to sell land at the death of a tenant for life. A codicil directed that no land should be sold until thirty years after the testator's death. It was held that the power as given in the will could be exercised, and the direction in the codicil rejected as too remote.³

§ 441. When gifts are made to several persons by one description, but the gift to one is not affected by the existence or non-existence of the others, the gifts are separable; and if modifying clauses are not too remote when applied to the gifts to some of the persons, but are too remote when applied to the gifts to the others, they will be operative in the former cases, although they are disregarded in the latter.⁴

for accumulation, see § 672, *post*.

¹ L. R. 14 Eq. 533; L. R. 8 Ch. 419.

² L. R. 8 Ch. 426. See § 477, *post*.

³ *In re Raphael*, 3 N. S. Wales State Rep. 196.

⁴ *Wilson v. Wilson*, 28 L. J. Ch. 95; 4 Jur. N. S. 1076. *Herbert v. Webster*, 15 Ch. D. 610. *Re Russell*, [1895] 2 Ch. 698. *In re Ferne-*

ley's Trusts, [1902] 1 Ch. 543. *Re Millward*, 87 L. T. R. 476. *In re Game*, [1907] 1 Ch. 276. See 51 Sol. J. 224. According to what is believed to be the sounder view, the modifying clauses were good as applied to all the gifts, see §§ 436-437 *b*, *ante*. In the cases of *Re Michael's Trusts*, 46 L. J. Ch. 651, and *Re Ridley*, *Buckton v. Hay*, 11 Ch. D. 645, the point was disregarded. See also *Cooper v. La-*

§ 442. Directions as to the mode in which absolute interests shall be enjoyed are void, apart from any question of remoteness, and therefore the fact that such directions are to be carried out at a time which may be too remote does not render the interests invalid.¹ Restraints on anticipation can be attached to gifts to married women for their separate use in fee,² but such restraints last only during the lives of the women. They will therefore be dealt with in the same way as when they are attached to life estates. In Massachusetts and Illinois, if property is held in trust for A. absolutely, with a proviso that it shall not be paid to him until he reaches a certain age, say forty, A. is not entitled to a conveyance before reaching that age.³ Suppose in Massachusetts such a proviso is attached to an equitable fee given to an unborn person, how will it be treated? In analogy to the prevailing English doctrine on restraints upon alienation, it will be void; according to the opinion of Sir George Jessel, which seems sounder, it will have the same effect, whatever that may be, that it would have when attached to an equitable fee given to a living person.

§ 442 *a*. Postponement of vested interests is allowed when it is for the benefit of other persons; for instance, to give an opportunity for a class to be increased; in such a case when the provision for postponement is to a period too remote, it is probably to be rejected as an illegal modification.⁴

roche, 17 Ch. D. 368; § 389, *ante*; Gray, *Restraints on Alienation* (2d ed.), §§ 272 *e*, 272 *f*; Marsden, *Perp.* 283; 1 Jarm. Wills (6th ed.) 363.

¹ Chap. IV., *ante*. On substi-

tutionary gifts, see §§ 386–388, *ante*.

² See Gray, *Restraints on Alienation* (2d ed.), §§ 125 *et seq.*

³ See §§ 121 *c*–121 *ii*, *ante*.

⁴ See §§ 121 *a*, 121 *b*, 638 *et seq.*

CHAPTER XIV.

LIMITATIONS AFTER ESTATES TAIL.

§ 443. A FUTURE estate which, at all times until it vests, is in the control of the owner of the preceding estate is, for every purpose of conveyancing, a present estate, and is therefore not obnoxious to the Rule against Perpetuities. Consequently an estate after an estate tail which must vest, if at all, at or before the termination of the estate tail, is never too remote; for there is always some one, viz. the tenant in tail, who can, at any time, destroy it by barring the entail.¹

§ 444. The fact that the tenant in tail may be a minor, or that there may be an indefinite series of minorities during which the estate tail cannot be barred, does not affect the question. This is no more than may happen with any interest. A fee simple absolute in possession cannot be transferred so long as the tenant is a minor.²

§ 445. If the estate tail is itself too remote it will not protect any future limitations:³ but it need not be an estate in possession, if it must vest within the limits of the Rule against Perpetuities.⁴

§ 446. In considering limitations after an estate tail the important point is to observe whether they can possibly vest at a time subsequent to the termination of the estate tail. If they can, they are bad. It is true that if the tenant in tail should bar the entail, such limitations would be destroyed; but if the estate tail should come to an end without being

¹ Lewis, Perp. 664, 665.

³ Marsden, Perp. 141.

² See *Ferrand v. Wilson*, 4 Hare, 344, 374; *Turvin v. Newcome*, 3 K. & J. 16, 19; *Marsden*, Perp. 20, 21.

⁴ Lewis, Perp. 666, 667. Cf. *Craig v. Stacey*, Ir. Term R. 249.

barred, and the remainder-man in fee come into possession, the limitations would be indestructible, and so obnoxious to the Rule against Perpetuities. As therefore the limitations might vest at a remote time, and might be incapable of destruction by the owner of the estate in possession, they are void altogether.

§ 447. As a remainder after an estate tail must take effect, if at all, on the termination of the estate tail, it can never be too remote.¹ And it is immaterial whether the remainder is directly to the persons to be benefited, or whether it is to a trustee in trust to sell the land and divide the proceeds among them, provided they must be determined at the expiration of the estate tail.²

§ 448. So a term for years limited on the expiration of an estate tail is not too remote,³ and a charge to arise on the termination of an estate tail is valid.⁴

§ 449. Conditional limitations which must take effect, if at all, during the continuance of an estate tail are also never too remote. Such is a gift over if any tenant in tail ceases to bear the arms or name of the settlor or testator.⁵

§ 450. But a conditional limitation which may not take effect till a time subsequent to the termination of the estate

¹ *Cole v. Sewell*, 4 Dr. & W. 1; 2 Con. & L. 344; 5 Ir. L. 190; 2 H. L. C. 186. *Jack d. Westby v. Fetherstone*, 2 Huds. & Br. 320. See *Doe d. Winter v. Perratt*, 5 B. & C. 48; 7 Scott, N. S. 1; 9 Cl. & F. 606; 6 Man. & G. 314; *Wrightson v. Macaulay*, 14 M. & W. 214; 4 Hare, 487; *Marsden, Perp.* 142, 143; 1 Jarm. Wills (6th ed.) 322.

² *Morse v. Ormonde*, 5 Mad. 99; 1 Russ. 382. *Heasman v. Pearse*, L. R. 7 Ch. 275, reversing the manifestly incorrect decision of *Malins, V. C.*, L. R. 11 Eq. 522. *In re Haygarth*, [1912] 1 Ch. 510. *Barber v. Pittsburgh Railway*, 166

U. S. 83, 108. So far as the trusts are for the benefit of persons who may not be determined until after the expiration of the estate tail, they are void. See *Tregonwell v. Sydenham*, 3 Dow, 194; *Marsden, Perp.* 144, 161, 162; §§ 419 *et seq.*, *ante*.

³ *Goodwin v. Clark*, 1 Lev. 35; *sub nom. Goodiar v. Clarke*, 1 Sid. 102; *Goodier v. Clerke*, 1 Keb. 73, 78, 169, 246, 462. *Morse v. Ormonde*, 5 Mad. 99; 1 Russ. 382.

⁴ *Faulkner v. Daniel*, 3 Hare, 199.

⁵ *Nicolls v. Sheffield*, 2 Bro. C. C. 214. *Carr v. Erroll*, 6 East, 58.

tail is too remote.¹ Thus a conditional limitation over if any owner of the property shall cease to bear the name of X., may come into effect after the tenant in tail has died without issue, and when the remainder-man in fee or his grantee is in possession, and it is therefore too remote.²

§ 451. A limitation which, after a legal estate tail, would be a contingent remainder, and therefore good, may be bad after an equitable estate tail, because it is not then really a remainder, but may take effect at a time after the estate tail has come to an end. Thus a contingent remainder after a legal estate tail male, on failure of issue generally, is good, because, unless it can take effect on the termination of the estate tail, it cannot take effect at all: but such a gift after an equitable estate tail male could, were it not for the objection of remoteness, take effect long after the estate tail was at an end; for a man's male issue may come to an end generations before his issue generally come to an end.³

§ 452. In like manner, while a remainder after an estate tail is good, a grant of the reversion on a contingency after an estate tail may be bad. Take the instance in the preceding section. A remainder after an estate tail male on failure of issue generally is good; but the grant of the reversion, after an estate tail male, to take effect on failure of issue generally is too remote.⁴

Doe d. Lumley v. Scarborough, 3 A. & E. 2. Harrison v. Round, 2 De G. M. & G. 190. See Cole v. Sewell, 4 Dr. & W. 1, 32; Benson v. Hodson, 1 Mod. 108, 111; Bandon v. Moreland, [1910] 1 I. R. 220; Gilb. Uses (Sugd. ed.) 157, note; Lewis, Perp. 665, 666; Marsden, Perp. 148-150; 3 Dav. Prec. Conv. (3d ed.) 364, note; 1 Jarm. Wills (6th ed.) 321, 322; Taylor v. Taylor, 63 Pa. 481. Cf. Ferguson v. Ferguson, 39 U. C. Q. B. 232; 1 Ont. Ap. 452; 2 Can. S. C. 497; 2 Hayes, Conv. (5th ed.) 170-172, note

(156). Such gift over limited on an estate in fee is, of course, bad. Bennett v. Bennett, 2 Dr. & Sm. 266.

¹ See Bandon v. Moreland, [1910] 1 I. R. 220; § 446, *ante*.

² Hartopp v. Carbery, cited 1 Sand. Uses (5th ed.) 204, 205. Lewis, Perp. 669-672. Marsden, Perp. 147.

³ See 62 L. T. 56. Cf. Abbiss v. Burney, 17 Ch. D. 211; § 325, *ante*; 1 Jarm. Wills (6th ed.) 322.

⁴ Lanesborough v. Fox, Cas. temp. Talb. 262; 3 Bro. P. C.

§ 453. Mr. Lewis¹ has suggested, and Mr. Preston² has said, that a conditional limitation which may take effect subsequent to the termination of an estate tail is good while the estate tail lasts, though void afterwards; but Mr. Preston admits that there is no decision to this effect, and such an opinion seems contrary to analogy. Suppose an estate is given to A. for life, remainder to B. in fee, with a conditional limitation over upon an event which may happen either before or after the death of A. No one has ever questioned that such a limitation is within the Rule against Perpetuities, even though the event should happen in the lifetime of A.³

§ 454. The law with regard to powers in connection with estates tail is given in the chapter on Powers.⁴

§ 454 *a*. In *Trevelyan v. Trevelyan*⁵ land was conveyed to A., who covenanted that he and his heirs would reconvey it to the grantor at any time "during the continuance of the strict settlement" under which he was tenant for life of other land. It was held that the covenant could not be enforced.

§ 455. Before the Statute *De Donis* an estate to A. and the heirs of his body gave A. a fee simple conditional, and the law is now the same in South Carolina, the Statute *De Donis* never having been in force there.⁶ The possibility of reverter after a fee simple conditional is not too remote.⁷ There can be no remainder after a fee simple conditional.⁸ It was held in several cases in South Carolina that there can be no executory limitation after a fee simple conditional, but there seemed no sufficient reason for this conclusion;⁹ and other South Carolina cases, in deciding that certain executory

(Toml. ed.) 130. *Bankes v. Holme*, 1 Russ. 394, note. *Bristow v. Boothby*, 2 S. & St. 465. 1 Jarm. Wills (6th ed.) 325. *Marsden*, Perp. 144. See *Lewis*, Perp. 668.

¹ Perp. 672; Suppl. 105.

² 2 Prest. Abs. 158.

³ See cases cited in the preceding sections; and cf. Sugd. Law of

Prop. 349; 3 Dav. Prec. Conv. (3d ed.) 466, note, 483, 484, note.

⁴ §§ 487 *et seq.*, *post.*

⁵ 53 L. T. R. 853.

⁶ § 14, note, *ante.*

⁷ § 313, *ante.*

⁸ § 14, *ante.*

⁹ § 14, note, *ante.*

devises after fees simple conditional are too remote, implied that, if limited so as not to be too remote, they would be good; and it has now been determined in South Carolina that there may be an executory devise after a fee simple conditional.¹ Whether an executory devise so limited that it must take effect, if at all, during the continuance of the fee simple conditional is destructible by the tenant of the fee, and therefore not open to an objection of remoteness, does not appear to have been adjudged in South Carolina.²

§ 456. There is a series of English cases in which substance seems to have been sacrificed to form. To understand them it is necessary to take into account some preliminary considerations. While a limitation after an estate tail is destroyed by barring the estate tail, a limitation before an estate tail is not affected by a recovery suffered by the tenant in tail. Thus if an estate tail is given to A., and on failure of A.'s issue a term is given to N., a recovery by A. destroys N.'s term; but if a term is given to N., and subject to this term an estate tail is given to A., a recovery suffered by A. does not affect the term. It may be difficult in some cases to tell whether a limitation precedes or follows an estate tail,³ but, when this is determined, the effect of barring the estate tail on such limitation is settled. Consequently, as we have seen, a limitation subsequent to an estate tail, provided it cannot take effect at a time posterior to the expiration of the estate tail, is not open to the objection of remoteness; while, on the other hand, a limitation prior to an estate tail is not good, unless it complies with the requirements of the Rule against Perpetuities.⁴

¹ § 14, note, *ante*.

² See *Jones v. Postell*, Harp. 92, 99, note, 100, note. In *Bethea v. Bethea*, 48 So. Car. 440, the question does not seem to have been presented, as the tenant of the conditional fee had acquired the interests of the executory devisees.

³ *Roper v. Halifax*, 8 Taunt. 845. *Doe d. Lumley v. Scar-*

borough, 3 A. & E. 2, reversed in *Cam. Scac. Id.* 897. *In re Stamford*, [1911] 1 Ch. 255, reversed on appeal. [1912] 1 Ch. (C. A.) 343. 3 *Dav. Prec. Conv.* (3d ed.) 398 *et seq.* *Chance, Pow. Suppl.* 114-126. *Sugd. Real Prop. Statutes* (2d ed.) 193-196. 1 *Jarm. Wills* (6th ed.) 323.

⁴ *Mainwaring v. Baxter*, 5 Ves.

§ 457. Thus far there is no question; the difficulty arises when a term is prior to an estate tail, but the trusts of the term can operate only during the continuance of the estate tail. Here, although the term is indestrucible by the tenant in tail, yet the latter, by barring the estate, will make it impossible for any of the trusts of the term to take effect. Are these trusts open to the objection of remoteness?

§ 458. Suppose land is devised to A. for life, remainder to his issue successively in tail male, remainder over in fee, subject to a term for five hundred years to trustees, in trust, if A. should die without issue, to raise a sum of money and pay it to B. Here the trust is too remote, for A. may not die without issue until long after the estate tail has been barred. These were substantially the facts in *Case v. Drosier*,¹ in which Lord Langdale, M. R., and, on appeal, Lord Cottenham, C., held such trusts too remote; as the Master of the Rolls said: "After a recovery, there would remain a term and a trust to be performed; a trust which could not be defeated, and a term which cannot be destroyed." ²

§ 459. But suppose, on the other hand, that a settlement was subject to a term the trustees of which were directed, in case any tenant in tail became owner of certain other property, to raise a sum of money for A. Here, if any tenant in tail barred the estate, although the term would not be destroyed, yet the trusts could never arise, because there would be an end to all possible tenants in tail under the settlement.

§ 460. Again, suppose Whiteacre, or personal property, is devised in trust to pay the income to the first tenant in tail of Blackacre who fulfils a condition which may be too remote, for instance, to the first tenant in tail who reaches twenty-five, the trust is too remote. It is true that the tenant in tail of Blackacre can bar the entail, so that no object of the trust

458. *Case v. Drosier*, 2 Keen, 764; 5 Myl. & Cr. 246. 1 Jarm. Wills (6th ed.) 313, 323. Lewis, Perp. 668, 669. Marsden, Perp. 152.

3 Dav. Prec. Conv. (3d ed.) 577, note.

¹ 2 Keen, 764; 5 Myl. & Cr. 246.

² 2 Keen, 774.

can ever come into existence; but in case the estate tail is barred, or comes to an end without being barred before any tenant in tail reaches twenty-five, there is a resulting trust to the heir or devisee of Whiteacre, or to the next of kin or the residuary legatee of the personalty. Such heir, devisee, next of kin, or legatee is the person who owns Whiteacre or the personal property, subject to the trust for the tenant in tail of Blackacre; but he cannot destroy this trust; he has not the practical absolute interest which a tenant in tail in possession has; and, therefore, the trust, not being destructible by him, is obnoxious to the Rule against Perpetuities.

§ 461. Once more, suppose personal property is devised in trust to convert it into real estate and settle it on the same terms as Blackacre, and Blackacre is settled on a tenant in tail. Here the trust is not too remote, for the tenant in tail has the immediate vested interest in the property, and the entire disposition of it is in his control.

§ 462. Finally, suppose personal property is devised in trust to accumulate the income until a certain amount is reached, and then settle it on the same terms as Blackacre, and Blackacre is settled on a tenant in tail. Here again the trust is not too remote, for the tenant in tail has a vested interest, and can stop the accumulation at any time.¹ Now, to take up the cases.

§ 463. In *Southampton v. Hertford*² land was conveyed in strict settlement subject to a term to trustees in trust, during the minority of any immediate tenant for life or tail under the settlement, to receive and accumulate the profits for the person who, on the expiration of the minority, should be tenant in possession and twenty-one years old. Sir William Grant, M. R., held the trust void. Here there was a resulting trust of the profits to the heir. He was the person entitled to the accumulations if the contingent gift never took effect, but he had no control over the contingent gift, and consequently such gift was void as too remote. A tenant in tail, who was a minor,

¹ See §§ 672, 673, *post*.

² 2 V. & B. 54.

had no vested interest in the rents; his interest was contingent on his reaching twenty-one, which might never happen. If he died before he reached twenty-one, the accumulations did not belong to his estate, but to the heir. No one was therefore absolutely entitled to the accumulated funds until the contingent event occurred, and consequently the gift of the accumulated fund was too remote. The objection was not to the trustees entering at a remote time, for the object of the trust could be at any time destroyed by barring the estate tail; but that, if the estate was not barred, and the trustees did enter, they were to accumulate the profits for a remote event, and for a person who might be other than the present tenant in tail; and that the present tenant in tail was not entitled to the accumulations.

§ 464. In *Marshall v. Holloway*¹ a testator gave his real and personal estate to trustees in trust to invest the rents and income, whenever any person beneficially interested under the will should be under age, as part of the personal estate; and, subject to this trust, he settled the real estate on A. for life, with remainders in tail. The trusts of the personal estate were too remote. Lord Eldon, C., held the trusts to invest during minority to be bad for remoteness. No criticism seems necessary on either of the preceding decisions. In neither of them was the objection that the trust to hold during the minority of tenants in tail was too remote, or that the direction to accumulate was in itself void, but that the object of the accumulation was too remote.²

¹ 2 Swanst. 432.

² See Lewis, Perp. Suppl. 183 *et seq.*; Marsden, Perp. 155, 156; 1 Jarm. Wills (6th ed.) 313, note; 3 Jur. n. s., pt. 2, 181; Sugd. Law of Prop. 347-349; 3 Dav. Prec. Conv. (3d ed.) 465, note; *Ferrand v. Wilson*, 4 Hare, 344, 377, 378; *Dungannon v. Smith*, 12 Cl. & F. 546, 610.

The earlier case of *Lade v. Holford*, 1 W. Bl. 428; 3 Burr. 1416;

Ambl. 479, is so obscurely reported that it is impossible to tell the ground on which it was decided. It was a case out of Chancery. A. by his will devised land to trustees and their heirs to the use of B. for life, remainder to the use of B.'s first and other sons in tail male successively, with remainder over; *provided* that while B. was under twenty-six, "and so often and during such time, as the person who

§ 465. In *Cross v. Glennie*¹ the accumulation during minorities was to be laid out in trust for such person or persons as for the time being should under the testator's will be entitled in possession to the settled estates. It was conceded by counsel that the limitations were not too remote, and Vice-Chancellor

for the time being (in case he had not otherwise directed) would, by virtue of the said will, have been entitled in possession to the devised premises as tenant for life or in tail, shall be under the age of twenty-six, the trustee and their heirs shall and may enter on the premises, and take the rents and profits," pay certain sums to such person, "and the residue to be disposed of as the residue of the testator's personal estate is thereby directed to be disposed of; viz., to be laid out in lands and settled as the estate before devised." B. reached twenty-six, died, and had a posthumous son, C. The question put to the Court of King's Bench was whether on the birth of C. the trustees took any estate in the premises devised, by virtue of the above proviso.

It was argued for C. that the proviso was void as tending to a perpetuity (not, however, because the trustee's estate might come into existence at too remote a period, but) "by taking away the power of alienation five years longer than the policy of the law admits;" and also because it was "in derogation of the legal powers of tenant in tail." 1 W. Bl. 429.

The Court of King's Bench certified that the trustees took no estate under the proviso, but assigned no reasons. Lord Northington, C., confirmed the certificate, saying: "The directions and provisions in

the testator's will, by which he attempted to direct the accumulation of the rents and profits of his real estate, being repugnant to the limitation of an estate tail to" C., "were void." Fearne, C. R. 530, Butler's note. Mr. Fearne says this case seems to fall within the rule "that estates shall not cease as to part, and vest and revest." Fearne, C. R. 530. Mr. Butler, in his note to the passage of Fearne, just cited, denies that this is the reason of the invalidity, and says: "The real objection to the limitation in the proviso was that it directed a dry accumulation of the surplus rents for a period of twenty-six years; this exceeded the period for which the law allows such an accumulation to be continued."

Lord Northington's remark supports Mr. Fearne's view that the case was decided, not on the ground of remoteness at all, but of repugnancy. And the argument of the counsel and the language of Mr. Butler show that the objection of remoteness arose from the accumulation being ordered for twenty-six years, and that had it been confined to twenty-one years, the proviso would not have been considered obnoxious to the Rule against Perpetuities. 3 Dav. Prec. Conv. (3d ed.) 467, note. 1 Jarm. Wills (6th ed.) 314. 2 Jarm. Wills (6th ed.) 1466, note.

¹ 2 Y. & C. C. 237.

Knight Bruce excluded expressly the question of remoteness from consideration. The case is interesting as showing that counsel thought the vice of the trusts in *Southampton v. Hertford* and *Marshall v. Holloway* was that the object of the trust was too remote, and that when tenant in tail in possession had a vested interest in the fund a trust for accumulation was unobjectionable.¹

§ 466. *Browne v. Stoughton*.² A testator devised land to trustees and their heirs in trust for A. for life, and on his death in trust for his first and other sons in tail male, and declared that if and so long as any person for the time being beneficially entitled to the possession of the estates devised should be under twenty-one, the trustees should receive the rents, apply a competent part to the maintenance of such person, and invest the residue to accumulate at compound interest, and then to invest the same in land to be approved of in writing by the person who would be tenant for life or in tail male thereof if purchased, if such person should be of age; but if such person should be under age, then at the discretion of the trustees, — the said land to be settled as near as possible on the trusts of the land by the will devised. The counsel in favor of the accumulation clause distinguished the case from *Southampton v. Hertford*, on the ground that the trust was bad in that case because the destination of the accumulated fund was too remote. But Shadwell, V. C., held that the clause in the case before him was void for remoteness, saying: "It never occurred to my mind that the case of *Lord Southampton v. The Marquis of Hertford* was determined with reference to what was to be done with the fund accumulated; and Lord Eldon's language in *Marshall v. Holloway* is express and clear."

§ 467. Mr. Lewis³ has given an elaborate criticism on *Browne v. Stoughton*. He contends that the distinction taken

¹ See Lewis, Perp. Suppl. 190, 191; 3 Dav. Prec. Conv. (3d ed.) 408, note; Marsden, Perp. 156.

² 14 Sim. 369.

³ Perp. Suppl. 174-190.

by counsel between that case and *Southampton v. Hertford* was sound; that in *Browne v. Stoughton* the tenant in tail had a vested interest in the fund to be accumulated, while in *Southampton v. Hertford* he had not. Mr. Lewis's view was in turn criticised by a writer in the *Jurist*,¹ and *Browne v. Stoughton* was followed, by Wood, V. C., in the substantially similar case of *Turvin v. Newcome*,² and still later in Ireland, by Chatterton, V. C., in *Cochrane v. Cochrane*,³ and the late text-books seem to consider the law as settled accordingly.⁴

§ 468. But, notwithstanding, Mr. Lewis's arguments do not seem to have ever been fairly met, and it is to be observed that the question has never come for decision before the Court of Appeal.⁵

§ 468 *a*. But in *In re Stamford*⁶ Warrington, J., followed *Browne v. Stoughton*, and although the Court of Appeal reversed the decision on the ground that the trust in question did not precede the estate tail, Fletcher-Moulton, L. J., said of *Browne v. Stoughton*: "I am aware that it has been subjected to severe criticism by very learned conveyancers, but it was followed by

¹ 3 *Jur. N. S.*, pt. 2, 181.

² 3 *K. & J.* 16. Wood, V. C., was in error in saying, 3 *K. & J.* 18, that while in *Turvin v. Newcome* the legal estate was vested in trustees, in *Browne v. Stoughton* it was not. In both cases the estates were in trust.

³ 11 *L. R. Ir.* 361. Trevelyan *v. Trevelyan*, 53 *L. T. R.* 853, was said by Bacon, V. C., to be governed by *Cochrane v. Cochrane*, but, in *Trevelyan v. Trevelyan*, the power to call for a conveyance might exist at a remote period, and might not be within the control of the owner of the land. See § 493, *post*.

⁴ Marsden, *Perp.* 156, 157, 160. 1 *Jarm. Wills* (6th ed.) 313-316.

See 3 *Dav. Prec. Conv.* (3d ed.) 466, note; *Sugd. Law of Prop.* 349; *Floyer v. Bankes*, *L. R.* 8 *Eq.* 115; § 505, *post*. In *Scarisbrick v. Skelmersdale*, 17 *Sim.* 187, a trust to accumulate during minorities was held bad, although the accumulations were to be made for the purpose of paying debts. This would seem to be wrong, at any rate. See § 676, *post*; Marsden, *Perp.* 158; 3 *Dav. Prec. Conv.* (3d ed.) 468, note.

⁵ And see *Briggs v. Oxford*, 1 *De G. M. & G.* 363; 3 *Dav. Prec. Conv.* (3d ed.) 468, 469, note.

⁶ [1911] 1 *Ch.* 255; [1912] 1 *Ch.* (C. A.) 343. See 27 *Law Quart. Rev.* 150, 156.

Wood, V. C., in *Turvin v. Newcome*, and has since been approved of by other judges and by leading text-writers. To refuse to follow it in a like case might unsettle titles, and I think it ought now to be considered as laying down the law correctly."

§ 469. Whatever may be the law on trusts for accumulation during the minorities of tenants in tail, there is no doubt that Wickens, V. C., in *Sykes v. Sykes*,¹ went a step beyond any previous case in holding a trust void where the object of the trust could be destroyed by the tenant in tail; and it is submitted the step was in the wrong direction. In that case land was settled on the testator's sons successively for life, with remainder to their issue respectively in tail, subject to a term for five hundred years to trustees in trust in any one or more of the testator's younger sons or their issue should become seised in possession of the estate by virtue of the will, then to raise certain sums. The trust was held void for remoteness. The Vice-Chancellor said: "It seems to me, on consideration, that this case is undistinguishable in principle from that of *Case v. Drosier*. . . . That being so, I ought not, I think, to go into the general question of principle, which, but for the decision in *Case v. Drosier*, might have been a very nice one; nor to seek to distinguish the present case from it on grounds which, if they had existed in it, would not, as I read the judgments of Lord Langdale and of Lord Cottenham, have altered their decisions."

§ 470. This seems a strange remark. The distinction between the case before the learned Vice-Chancellor and *Case v. Drosier* is obvious and essential. Barring the estate tail in *Case v. Drosier* would not have affected the trusts of the term,² while in *Sykes v. Sykes* barring the estate tail would have rendered it impossible to carry them into effect.³

¹ L. R. 13 Eq. 56.

² § 458, *ante*.

³ See Marsden, Perp. 141, 153, 154, 160; 3 Dav. Prec. Conv. (3d

ed.) 577, 578, note, 1053; 4 Dav. Prec. Conv. (3d ed.) Corrigenda, xlv.

§ 471. The present condition of the English authorities is this: 1. The trusts of a term prior to an estate tail, for the accumulation of rents during the minorities of successive tenants in tail, are void for remoteness, though such tenants in tail have a vested interest in the accumulations.¹ 2. The trusts of a term prior to estates tail may be too remote though to arise on contingencies which must happen, if at all, during the continuance of the estates tail, and which a barring of the estates tail would render impossible. *Sykes v. Sykes*² is the only authority for this second proposition. In favor of it, it may be said that it seems indistinguishable in principle from the first proposition. Against it, it may be said that the cases under the first proposition form an anomalous class which should not be enlarged.³

§ 471 *a*. In the late case of *Longfield v. Bantry*⁴ an estate X. was settled in strict settlement on W. A testator gave the residue of his estate in trust to purchase land and settle it in the same manner as X., and until such purchase to apply the whole or any part of the income to the improvement of the X. estates. Chatterton, V. C., following an unreported Irish case of *Clements v. Leitrim*, held that the trust was good. The Vice-Chancellor thought the case was distinguishable from *Browne v. Stoughton*⁵ and his own ruling in *Cochrane v. Cochrane*.⁶ The distinction is not easy to perceive; the decision certainly shows a disposition not to extend the doctrines of those cases.

§ 472. If *Sykes v. Sykes* is to stand as law, then the English rule will be that the question of remoteness is to be determined by the fact whether a term precedes or follows an estate tail. If it precedes, it is indestructible, and may therefore be too remote. If it follows, it is destructible, and cannot be void for remoteness. But the true question would seem

¹ §§ 466-468, *ante*.

² § 469, *ante*.

³ See 1 Jarm. Wills (6th ed.)

⁴ 15 L. R. Ir. 101.

⁵ 14 Sim. 369; § 466, *ante*.

⁶ 11 L. R. Ir. 361; § 467, *ante*.

to be, not whether the term precedes or follows the estate tail, but whether the trusts of the term can or cannot arise after the expiration or barring of the estate tail. This is in analogy with the law of remoteness generally, which disregards the form for the substance, and does not avoid limitations which are and always will be in the entire control of the owner for the time being of the property. It is submitted that in the very improbable event of such a case arising in one of the United States where estates tail still exist, the decision ought to turn on whether the trusts in property are in control of the tenant in tail of the property, and not on the order of the limitations.¹

¹ See 25 Harv. Law Rev. 656.

CHAPTER XV.

POWERS.

§ 473. IN powers, questions of remoteness are governed by three rules. 1. If a power can be exercised at a time beyond the limits of the Rule against Perpetuities, it is bad. 2. A power which cannot be exercised beyond the limits of the Rule against Perpetuities is not rendered bad by the fact that within its terms an appointment could be made which would be too remote. 3. The remoteness of an appointment depends on its distance from the creation and not from the exercise of the power. The first two rules relate to the creation of powers, the third rule to their execution.

§ 474. After these three rules there remain to be discussed:

4. The effect of holding appointments void; 5. Election.

1. *If a Power can be exercised at a Time beyond the Limits of the Rule against Perpetuities, it is bad.*

§ 474 *a*. Sometimes a power is spoken of as too remote; this is a natural, but it is not an exact, mode of expression; it is not the power which is too remote, but the estate or interest appointed by it. When we say that a power is too remote, we mean that each and every estate or interest appointed under it is on a contingency which may happen at such a time that the estate appointed will be too remote. In order that an estate may arise upon an appointment under a power, it is a condition precedent that the power be exercised; and if a power can be exercised more than twenty-one years after a life in being, a condition precedent to the estate may be fulfilled at such a time that the estate appointed may vest at a period too remote under the Rule against Perpetuities.

§ 474 *b*. It is to be observed that while the exercise of a power is a condition precedent to an appointment arising under it, it may not be the only condition precedent, and if there is another condition precedent which may not be fulfilled until later than twenty-one years after a life in being, the appointment will be too remote. So, on the other hand, if the other condition precedent must be fulfilled, if at all, within a life in being and twenty-one years, so that any interest appointed must vest, if at all, within that period, then the fact that the power is to an unborn person will not render an appointment under it too remote. See the following sections and also §§ 958 *et seq.*, *post*.

§ 475. Therefore when a donee of a power may, by possibility, be alive beyond the limits of the Rule,¹ and at the same time the contingency on which it is directed that an interest appointed under the power shall vest may also arise beyond the limits, the power is void.

§ 476. When, however, either such contingency or the life of the donee of the power is confined within the limits of the Rule, the power is valid. Thus, although there is no limit on the series of persons who can exercise a power, yet if the contingency on which the creator of the power has directed that any interest appointed under the power shall vest must fall within twenty-one years after lives in being at its creation, it is good. For instance, if a power is given to A. and his heirs to appoint to B., a person living at the creation of the power, it is good. So, although the execution of a power is not limited in terms to any time, yet if the sole donee of the power is living at the time of its creation, as it must be exercised, if at all, in his lifetime, it is not void.² This last proposition must,

¹ *Re Hargreaves*, 43 Ch. D. 401. *Hartson v. Elden*, 50 N. J. Eq. 522, 526. See *Johnston's Estate*, 185 Pa. 179, 189. In *Grange v. Tiving*, O. Bridg. 107 (1665), a power to a settlor or any of the heirs of his body to revoke the uses of a settle-

ment was held to be lawfully exercised by his daughter, who was his heir. The question of remoteness was not raised or considered, and on this point the case is not law. *Sugd. Pow.* (8th ed.) 152.

² *Lewis Perp.* 554. *In re De*

however, be confined to those cases where the power is to be executed on or after the event which renders the execution of the power valid. If the validity of the execution of a power is to depend upon a contingency which will, or may, occur after the donee has exercised the power, then the power will be void. Thus a power to A. to appoint to all of his grandchildren who are living twenty-five years after his death is bad.¹

§ 476 *a*. In *Bristow v. Boothby*,² by a marriage settlement, land, after the death of husband and wife, was given, on failure of issue generally of the marriage (which might happen subsequently to the estates in tail male created by the settlement), to such person as the wife might, in the lifetime of the husband, appoint. The wife, by will, there being at her death no issue of the marriage,³ appointed to A. It was held that A. did not take. The law, therefore, is that if the instrument creating the power directs that the power shall have its effect only upon a contingency which may be too remote, the power

Sommary, [1912] 2 Ch. 622, 630, 631. *Collins v. Foley*, 63 Md. 158. See *Lawrence's Estate*, 136 Pa. 354, 364.

¹ See §§ 474 *a*, 474 *b*, *ante*. In *Blight v. Hartnoll*, 19 Ch. D. 294, a testatrix directed that property should be sold on an event which might be too remote, and the proceeds divided among her grandchildren then living, as A. should appoint. A. appointed before the happening of the event; Fry, J., held that the power was bad as violating the Rule against Perpetuities, and also that the appointment was bad because it could not be made until after the happening of the event. But if the second ground was good, it followed that the power could not be exercised unless the event happened in the lifetime of A., and was therefore not objectionable on the ground of remote-

ness. See *Marsden*, Perp. 238, 239.

Mr. Sweet, 1 Jarm. Wills (6th ed.) 311, says: "It is submitted that the first ground given by Fry, J., is unsound and that the case was rightly decided on the second ground. If, however, the property had been sold during the lifetime of [A.], it seems clear that she might have made a valid appointment to any of the testatrix's grandchildren. If so, it follows that a power of appointment may be effectual or ineffectual according to the events which happen after its creation." But it is submitted that the case of *Bristow v. Boothby*, § 476 *a*, *post*, shows these last two sentences are incorrect.

² 2 S. & St. 465; 4 L. J. o. s. Ch. 88. See *In re Norton*, [1911] 2 Ch. 27.

³ See 4 L. J. o. s. Ch. 89.

is bad, *ab initio*, and does not become good by the contingency in fact occurring before the appointment. And the power is not made good by an appointment made under it being conditioned upon the happening of the contingency within the limits of the Rule against Perpetuities. Or to express it in other words, if a limitation on a certain contingency would be too remote, a power whose operation is conditioned on that contingency is void, although an appointment might be made under it which must certainly take effect within the limits of the Rule against Perpetuities.¹

§ 476 *b*. Suppose, however, the donee of a power is a living person, and makes an appointment which must vest at his death but will not come into possession until the death of an unborn person, to whom a good life estate has been limited, is that appointment bad? It would seem not. For instance, suppose property is devised to a woman for life, on her death to any husband whom she may leave (and who may be born after the testator's death) and on the death of the survivor of herself and her husband to her issue as she may appoint, and she appoints to her children. Here, though the estates appointed to the children will not come into possession till the death of her husband, they will vest on her death, and, therefore, will not be too remote. For if the original devise had been to her for life, remainder to any husband she might have for life, remainder to her children in fee, the remainder to the children would not have been too remote.²

§ 477. A power given to the unborn child of a living person is void;³ that is, if it is a power to be exercised by will only, or

¹ Marsden, Perp. 237. Generally in such a case the intention will be clear that the power is to be exercised only after the contingency has occurred. When this is so, the power is good, if the donee is a person living at the time of the creation of the power; for the power is then, in truth, a power to

appoint, if the contingency happens in the life of the donee. See *Blight v. Hartnoll*, 19 Ch. D. 294; Marsden, Perp. 238, 239. Cf. *Bartlett v. Sears*, 81 Conn. 34.

² See *In re Norton*, [1911] 2 Ch. 27. Cf. § 522, note, *post*.

³ Except as indicated in §§ 474*b*, 476, *ante*.

a special power to be exercised by deed.¹ But if such unborn child has a general power to appoint by deed, he has the absolute control, exactly as if he had the fee, since he can at once appoint to himself. Such general power to appoint by deed is therefore not obnoxious to the Rule against Perpetuities.² If, however, a condition precedent to the exercise of a general power by an unborn child is the happening of an event which may not occur till too remote a period, the power is bad. Thus such a power is void when it can be exercised only with the consent of trustees,³ or only upon the child's marriage.⁴

§ 478. Although no time is limited for the execution of a power, yet if the law requires it to be exercised within a reasonable time or not at all, and if any time over twenty-one years is not a reasonable time, then the power is good, for it can be exercised only within limits which are not too remote.⁵

§ 479. The same rule as to the separableness of powers should govern as obtains in reference to the separableness of direct limitations.⁶ That rule is that when the testator or settlor has separated the limitations they may be considered apart; but when he has not separated them they must stand or fall together. So when a testator or settlor has given distinct powers, one may be too remote, and the other not; but when he has not separated them, the law will not separate them for him.

¹ *Wollaston v. King*, L. R. 8 Eq. 165. *Morgan v. Gronow*, L. R. 16 Eq. 1, 9, 10.

² *Bray v. Hammersley*, 3 Sim. 513; *sub nom. Bray v. Bree*, 2 Cl. & F. 453; 8 Bligh, N. S. 568. See *Lawrence's Estate*, 136 Pa. 354, 364; § 524, *post*; *Sugd. Pow.* (8th ed.) 394 *et seq.*, 683; *Lewis, Perp.* 483; *Farwell, Pow.* (2d ed.) 292.

³ *Webb v. Sadler*, L. R. 14 Eq. 533; L. R. 8 Ch. 419; § 440, *ante*.

⁴ *Morgan v. Gronow*, L. R. 16 Eq. 1, 10. *Marsden, Perp.* 236.

⁵ *Re Sudeley*, [1894] 1 Ch. 334.

See *Peters v. Lewes & East Grinstead R. Co.*, 18 Ch. D. 429, 434; *Re Tweedie*, 27 Ch. D. 315; *Barber v. Pittsburgh, &c. R. Co.* 166 U. S. 83, 108; *Cooper's Estate*, 150 Pa. St. 576; *Eary v. Raines*, 80 S. E. Rep. (W. Va.) 806; § 491, *post*; *Marsden, Perp.* 242; §§ 214 *a-214 e*, *ante*; §§ 617, 618, 621-624, *post*. Cf. *Holder v. Preston*, 2 Wils. 400.

⁶ See Chap. IX., *ante*. Cf. *In re Raphael*, 3 N. S. Wales State Rep. 196.

§ 480. As in the case of direct limitations, the application of this rule to powers may often be difficult. *Attenborough v. Attenborough*¹ is near the line. In that case a testator devised property to his brother James, his heirs, executors, and administrators, in trust; and he directed "my trustees" to set apart from the property £5,000, "and at any time or times, at their absolute discretion," to give or lend any part of it to his nephew or any of his nephew's children in such manner "as to my said brother or other my trustees in his or their absolute discretion shall seem meet, yet so that it shall not be imperative on my said brother James or other my trustees" to make any gift or loan to the nephew; "that my said brother James and other my trustees shall not make any advance" to the nephew unless he reform his habits "to the satisfaction of my said brother James or other my said trustees; but my trustees may make" a gift or loan to the nephew's children, without proof of their legitimacy; that "my said trustees," when the nephew and his children are dead, are empowered to distribute said sum amongst other nephews; that his brother should be executor, and that any vacancy or vacancies in the trusteeship might be supplied by the trustees and executors for the time being, or by the acting executors or administrators of the person who should have last died. It was contended that the power was too remote, and that therefore the brother James could not validly exercise it; but Wood, V. C., said: "As regards the creation of the power and the persons in whom it is vested, it is to be exercised by James, the testator's brother, or other the trustees of this will. I think it may properly be divided and considered as two distinct powers, one vested in James, and the other in the persons coming in as his successors in the trust under this will. Therefore, James the brother is a person who clearly has a right to make a valid appointment, whatever might be said if any succeeding trustee had attempted to exercise this power."²

¹ 1 K. & J. 296.

bleness of powers, see *In re Bowles*, [1905] 1 Ch. 371; *In re Davies &*

² For other cases on the separa-

§ 481. It was suggested by Lord Cottenham, C., in *Wood v. White*,¹ that a power exercisable, according to its terms, beyond the limits of the Rule against Perpetuities might be validly exercised within those limits. In that case there was a power to sell given to trustees, and the Chancellor held that as the trust must terminate within the required limits, the power was unobjectionable; but he added: "If it were otherwise, the sale in question is within the permitted period, and there would not, I think, be much doubt of its validity until the expiration of that period."²

§ 482. This idea seems to have sprung from the feeling that the powers of sale and leasing usual in settlements must be supported, and could only be supported in this manner, it not being yet clearly apprehended that such powers were wholly unobjectionable, because destructible.³

§ 483. But Lord Eldon, in *Ware v. Polhill*,⁴ said that if a power "is bad to the extent in which it is given, you cannot model it to make it good. I think, the soundest ground is, that the power is bad." This was followed by Wigram, V. C., in *Ferrand v. Wilson*;⁵ and now, when it is well settled that

Kent's Contract, [1910] 2 Ch. 35;
In re Norton, [1911] 2 Ch. 27;
Hutchinson v. Tottenham, [1898]
 1 I. R. 403, § 522, note, *post*;
Bandon v. Moreland, [1910] 1 I. R.
 220; *In re De Sommers*, [1912] 2
 Ch. 622, 631, 632; *Miles v. Har-*
ford, 12 Ch. D. 691; § 349, *ante*.

¹ 4 Myl. & Cr. 460, 482.

² And so accordingly 2 Prest.
 Abs. 158. But see Lewis, Perp.
 553, 554. Lord Langdale, M. R.,
 before whom the case originally
 came, is said to have "intimated
 serious doubts whether the power
 might not be void *ab origine*, either
 as tending to a perpetuity, or as
 being incapable of being modelled
 and distributed." 4 Myl. & Cr.
 470, 471.

³ Lewis, Perp. 541 *et seq.*, 556.
 Sugd. Pow. (8th ed.) 848; § 484,
post.

⁴ 11 Ves. 257, 283.

⁵ 4 Hare, 344, 376-381. It
 should be remarked, however, that
 the powers in *Ware v. Polhill* and
Ferrand v. Wilson would probably
 at the present day be considered
 destructible, and therefore not
 open at all to the objection of re-
 moteness; §§ 495-504, *post*; and
 that Wigram, V. C., in *Ferrand v.*
Wilson, was inclined to think Lord
 Eldon's statement too broad. See
 Lewis, Perp. 542 *et seq.*; Sugd.
 Pow. (8th ed.) 846 *et seq.*

the ordinary powers to trustees are unobjectionable,¹ there seems no sufficient reason for such a departure from the doctrines and analogies of the Rule against Perpetuities as would be involved in sustaining, in part, powers the exercise of which might be too remote.² To the vesting of an interest under a power, the exercise of that power is a condition precedent; and if such exercise may take place beyond the limits fixed by the Rule, the interest is too remote. To reach the opposite conclusion, it is necessary to take some arbitrary limit (which the settlor or testator has not suggested), and to say that if the condition happens to fall within this arbitrary limit it is good. The Rule against Perpetuities says: "A power can be exercised provided it is one that by its terms must be exercised at latest within twenty-one years after the death of all the persons who were alive when the power was created." This proposed modification says: "The power can be exercised provided it is exercised before something happens." What is the something? The death of the first donee of the power? Twenty-one years after the death of the first donee? The death of the survivor of those donees who were alive at the testator's death? Twenty-one years after the death of such survivor? The death of the first life tenant? Twenty-one years after the death of the first life tenant? The death of the survivor of the life tenants? Twenty-one years after the death of such survivor? The death of an appointee who was alive at the death of the testator? The death of the survivor of the first donee and the first life tenant? or twenty-one years after? The death of the survivor of the first donee and all the life tenants? or twenty-one years after? The death of the survivor of those donees who were alive at the testator's death and of the first life tenant? or twenty-one years after? The death of the survivor of those donees who were alive at the testator's death and of all the life tenants? or twenty-one

¹ §§ 498, 499, 506, 507, *post*.

Third Rep. Real Prop. Comm. 34,

² Lewis, Perp. 556-560; Suppl. 194-196. Marsden, Perp. 240.

42, 43. See *Hale v. Pew*, 25 Beav. 335.

years after? and so on indefinitely. What arbitrary limit is the Court to select?¹

§ 484. As has been said, the inconvenience of abridging the ordinary powers of trustees was the only thing that excused a belief in the partial validity of powers; and now that it is clearly seen how such ordinary powers can be sustained in full accordance with the Rule against Perpetuities,² there remains no reason to introduce an exception into the harmonious working of the Rule, which can only lead to confusion.

§ 485. *Kenrick v. Dempsey*³ must therefore be deemed to have been wrongly decided. There K. conveyed land to D., and D. gave a bond to K. conditioned to pay the rents to K.; but if D., his heirs, executors, administrators, or assigns, should pay K., his heirs, executors, or assigns, the fair price of the land, the obligation to be void. K. filed a bill for a reconveyance, alleging that the right to buy given to D. was void for remoteness. Esten, V. C., and Spragge, V. C., thought that here was a power which was good for the life of D. and twenty-one years more, and a reconveyance was refused.⁴

§ 486. A power to sell to raise money for paying debts or legacies is not obnoxious to the Rule against Perpetuities, both because such power must be exercised within a reasonable time,⁵ and also because it creates a charge in favor of creditors or legatees which gives them a present right in the property to have it sold at once without regard to the wish of any donee of the power to postpone it.⁶

§ 487. The former practice of English conveyancers in drawing settlements was to give trustees powers of sale and exchange and of leasing, without imposing any limits of time, and "half the titles in the kingdom depended on the validity of

¹ See Lewis, Perp. 559, 560.

² §§ 498, 499, 506, 507, *post*.

³ 5 Grant, 584.

⁴ See *Hasker v. Summers*, 10 Vict. L. R. Eq. 204.

⁵ § 478, *ante*.

⁶ 1 Pow. Dev. (Jarm. ed.) 250,

note. Lewis, Perp. 558. Marsden, Perp. 247. Third Rep. Real Prop. Comm. 35. *Silk v. Prime*, 1 Bro. C. C. 138, *note*. See *Briggs v. Oxford*, 1 De G. M. & G. 363; § 504, *post*.

such powers.”¹ Since the decision in *Ware v. Polhill*,² it has been the ordinary practice to limit the exercise of powers of sale and exchange in a settlement to lives in being and twenty-one years.³ But, nevertheless, it is now perfectly well established that no limits are necessary in giving to trustees under ordinary settlements and wills the power to sell and exchange or to make leases. Hence it has been supposed that such powers form exceptions to the Rule against Perpetuities; but it is now generally recognized that there is no exception, though it was some time before the matter was placed in a clear light.⁴

§ 488. Two unsatisfactory reasons have been given why these unlimited powers do not violate the Rule against Perpetuities. *First*: That the exercise of a power to sell and exchange is merely a change of title and not a destruction of interest. “This is, at most, an *equitable* answer to a *legal* objection. When Blackacre, entailed upon A., is sold under a power paramount, A.’s estate tail is defeated, his interest is destroyed, as to Blackacre, both *at law and in equity*; and to say that other land (possibly leasehold, not capable of an entail) *may* be bought and substituted, under *trusts* declared of the *money*, cannot be a valid argument in support of the legal power over the land.”⁵

§ 489. *Second*: That such a power is favorable to alienation instead of restraining it. But the power does restrain alienation on the part of the owner of the fee. “A power of sale, suspended indefinitely over the fee, is open to the same

¹ Sugd. Pow. (8th ed.) 848. See 1 Hayes, Conv. (5th ed.) 497.

² 11 Ves. 257.

³ 3 Dav. Prec. Conv. (3d ed.) 483, note, 570. Challis, Real Prop. (3d ed.) 194. With powers of leasing it has not been usual to put these limits. 3 Dav. Prec. Conv. (3d ed.) 483, note, 570. 1. Chance, Pow. § 318.

⁴ Lewis, Perp. c. 25; Suppl.

194 *et seq.* Sugd. Pow. (8th ed.) 846 *et seq.* Marsden, Perp. 241–246. 1 Jarm. Wills (6th ed.) 311, 312. 9 Byth. Conv. (Jarm. ed.) 456, note. 3 Dav. Prec. Conv. (3d ed.) 577.

⁵ 1 Hayes, Conv. (5th ed.) 498. Lewis, Perp. 547. See 1 Pow. Dev. (Jarm. ed.) 251, note; Sugd. Pow. (8th ed.) 848.

objection as an executory devise or springing use, to take effect whenever A. or his heirs shall do a given act.”¹ “It enables the trustees to sell, but the owner in fee, who would otherwise be able to sell, is incapacitated.”²

§ 490. The true reason for holding such powers good is that the trusts to which they are attached must come to an end, or can be destroyed, within the limits fixed by the Rule against Perpetuities. This is the case in ordinary settlements or wills where the property is settled or devised for life with remainders in tail, or for life only, as is more common in America. The life estates are usually for lives in being; the estates tail can be barred; and when, by the expiration of the life estates and estates tail or by the barring of the estates tail, the ultimate remainder-man in fee is entitled to possession, he either gets the legal estate or he is entitled to call upon the trustee for a conveyance of it. If he gets the legal title, the power at once disappears.³ If he has only the equitable fee, but is entitled to call for the legal estate from the trustees, the power is sometimes considered as ceasing at once; and even if the intention is that the power shall continue in the trustees until conveyance, yet it is not too remote; for the owner of the equitable fee can destroy it at any time by demanding a conveyance.⁴

§ 491. If it appears to be the intention that the power shall

¹ Lewis, Perp. 547.

² *Per Bayley, B., Boyce v. Hanning*, 2 Cr. & J. 334, 339. 1 Hayes, Conv. (5th ed.) 498. See Sugd. Pow. (8th ed.) 848.

³ *Cole v. Sewell*, 4 Dr. & W. 1, 32.

⁴ Whether a power is to come to an end when the ultimate remainder-man is beneficially entitled, and can therefore call for a conveyance, or whether it is to continue until such remainder-man is actually clothed with the legal fee, is a question of intention. Ordinarily

it will be presumed that it was intended to come to an end when the equitable fee vests in possession. A case where it was held to continue is *Re Cotton's Trustees*, 19 Ch. D. 624. So *Re Tweedie*, 27 Ch. D. 315; *Heard v. Read*, 171 Mass. 374. See also *Peters v. Lewes, &c. R. Co.*, 18 Ch. D. 429, 434; *Taite v. Swinstead*, 26 Beav. 525, 529; *Brown's Settlement*, L. R. 10 Eq. 349, 353. Cf. *Biggs v. Peacock*, 20 Ch. D. 200; 22 Ch. D. 284; *Boyd v. Allen*, 24 Ch. D. 622.

continue after the ultimate fee or absolute interest vests in possession, even then it is not void, if it must be exercised within a reasonable time after lives in being, and if such reasonable time is less than twenty-one years.¹

§ 492. And again, when the power can be exercised only with the consent of the person entitled to the fee or absolute property, it is not void; for a conveyance by such person would debar him from consenting to the exercise of the power, and puts it therefore entirely within his control.²

§ 493. But if it is the intention that the power shall continue notwithstanding that the legal fee has vested in possession, and if the exercise of the power is not limited in the manner indicated in the preceding sections, such power is void.³ And it is immaterial whether there are any particular estates preceding the estate in fee or not. That, however, a power in a settlement or will was intended to continue after the ultimate remainder-man had become clothed with the legal fee is so highly improbable, that such intention would have to appear in the most unmistakable manner in the instrument.

§ 494. If the power is one which can be exercised after the ultimate fee vests in possession, the fact that a recovery suffered by a tenant in tail would bar it will not make it good. For the estate tail may come to an end without being barred, and then the power will be in existence and indestructible at a remote period.⁴

§ 495. As has been said,⁵ it was some time before the law with regard to powers of sale and exchange in trustees of settlements was placed on a sound footing. The first case was *Ware v. Polhill*.⁶ There leasehold estates were bequeathed to trustees in trust to pay the rents to those persons who were, for the time being, entitled to certain land under a strict settle-

¹ § 478, *ante*.

² *Biddle v. Perkins*, 4 Sim. 135.
Powis v. Capron, Id. 138, note.
Lewis, Perp. 555, 561, 562. Third
Rep. Real Prop. Comm. 34, 42, 43.

³ Third Rep. Real Prop. Comm.

34. *Lewis, Perp.* 555 *et seq.* Marsden, *Perp.* 240.

⁴ See *Bristow v. Boothby*, 2 S. & St. 465. Cf. § 446, *ante*.

⁵ § 487, *ante*.

⁶ 11 Ves. 257.

ment. The trustees had power, with the consent of such persons, and during the minority of such persons at their own discretion, to sell the leaseholds and invest the proceeds in real estate to the same uses. The first tenant in tail having died while an infant, his administratrix sought by a bill in equity a conveyance of the leaseholds from the trustees, and an account. Questions other than those of the validity of the power were chiefly discussed. Lord Eldon decided these questions, and two days later added: "Upon farther consideration as to the leasehold estate, I think that power of sale is void; for it may travel through minorities for two centuries; and, if it is bad to the extent in which it is given, you cannot model it to make it good. I think the soundest ground is, that the power is bad."¹

§ 496. This remark at first caused great alarm among the conveyancers, who feared that it struck at the validity of all powers of sale or exchange which were not limited in express terms to a time within the Rule against Perpetuities; and although, on various grounds, they contended that such powers were good,² yet they adopted the practice of limiting such powers within the bounds fixed by the Rule against Perpetuities.³

§ 497. But in fact in *Ware v. Polhill* the same result would have been reached had it been held that the power ceased to be exercisable, when the first tenant in tail got an absolute interest in the personalty, and therefore was not void. And that this was the ground upon which the decision could be supported was said, rather obscurely, by Sir E. B. Sugden,⁴ and afterwards more clearly by Sir W. P. Wood, V. C., in *Lantsbery v. Collier*⁵ and *Doncaster v. Doncaster*.⁶

¹ 11 Ves. 283.

² See Lewis, Perp. 544 *et seq.*

³ § 487, *ante*.

⁴ Sugd. Pow. (8th ed.) 846-848. See Lewis, Perp. 542-544; 1 Chance, Pow. §§ 312, 313; 1 Pow. Dev. (Jarm. ed.) 248, note.

⁵ 2 K. & J. 709. "With regard

to the doubt suggested by *Ware v. Polhill*, Lord St. Leonards has said, and it has been repeated since by other authors, that the question supposed to have been decided by Lord Eldon in that case did not, in fact, arise. It is true that Lord Eldon, in holding that the power

§ 498. Whatever doubt may have been formerly entertained, the law is now well settled. In several cases powers have been held good when given to the trustees of property settled in tail.¹

§ 499. There are also many cases in which powers have been held good when property has been settled for life with remainders in fee (which is the common mode in America).²

was void, put it as a ground of his decision that the power might travel through minorities for centuries. Still, that was by no means a necessary ground for the decision. There leaseholds were settled as well as freeholds and copyholds, and the result of the events which had happened was, that the leaseholds had become absolutely vested in an infant tenant in tail; and the question was, whether, after the estate had thus become absolutely vested, the power could be exercised. I apprehend there can be no doubt whatever, and Lord St. Leonards seems to have arrived at that conclusion, — that, when what I may call the uses of the settlement, and the purposes of the settlement, are spent, the power is no longer capable of being exercised; and although there may be a technical difficulty with respect to the power being collateral, still the Court will regard the purposes of the settlement as in fact exhausted; and the purposes of the settlement being exhausted,

and the power having been created solely for the purposes of the settlement, there is an end to any exercise of the power which could operate in derogation of an absolute interest acquired by any party under the trusts of the settlement." 2 K. & J. 717, 718.

² 3 K. & J. 26, 38. To the same effect are *Wolley v. Jenkins*, 23 Beav. 53, 62; and 3 Dav. Prec. Conv. (3d ed.) 570, 571. See also *Ferrand v. Wilson*, 4 Hare, 344, 378–380; *Briggs v. Oxford*, 1 De G. M. & G. 363, 370; *Taite v. Swinstead*, 26 Beav. 525, 530. Although this seems to be the explanation of *Ware v. Polhill*, universally received at present, it may be doubted if the testator in that case intended the power to cease on an infant tenant in tail becoming absolutely entitled; and unless he did, the power was bad, for the reason given by Lord Eldon, that it might "travel through minorities for two centuries."

¹ *Waring v. Coventry*, 1 Myl. & K. 249. *Wallis v. Freestone*, 10 Sim. 225. *Briggs v. Oxford*, 1 De G. M. & G. 363. (See 3 Dav. Prec. Conv. (3d ed.) 468, 469, note.) *Lantsbery v. Collier*, 2 K. & J. 709. See *Cole v. Sewell*, 4 Dr. & W. 1, 32; *Brown's Settlement*, L. R. 10 Eq. 349, 353.

² *Boyce v. Hanning*, 2 Cr. & J. 334. (See *Lewis, Perp.* 548.) *Nelson v. Callow*, 15 Sim. 353. *Doncaster v. Doncaster*, 3 K. & J. 26, 38. *Brown's Settlement*, L. R. 10 Eq. 349. *Taite v. Swinstead*, 26 Beav. 525. *Cresson v. Ferree*, 70 Pa. 446. *Crawford v. Lundy*, 23 Grant, 244. See *Wood v. White*, 4

§ 500. Life estates may be given to unborn children and the subsequent remainders will be good, provided they vest not later than lives in being. Thus land may be devised to A., a bachelor, for life, remainder to A.'s eldest son for life, remainder to A.'s other children in fee.¹ But a power which was to subsist until the ultimate remainder vested in possession would here be bad, because it might be exercised during the life of A.'s eldest son, which might be more than twenty-one years after a life in being.

§ 501. In *Ferrand v. Wilson*² land was devised on estates for life and in tail with an ultimate remainder in fee, and a power was given to the executors or the survivor of them and the executors of the survivor, until some person entitled in possession under the limitations of the will to an estate tail or some greater estate should reach twenty-one, to enter and cut timber and apply the proceeds in payment of debts and legacies with the consent of the devisee in possession, and the surplus in the purchase of lands to be settled to the uses of the will. Sir James Wigram, V. C., held the power to be too remote.³

§ 502. *Ferrand v. Wilson* has been much criticised, and it is difficult to see how it can be sustained. The power could be exercised only so long as a tenant in tail or in fee was in possession under the limitations of the will; and as a tenant in tail or in fee could alienate the land, the power was de-

Myl. & Cr. 460; *Lantsbery v. Collier*, 2 K. & J. 709, 719-722; *Wolley v. Jenkins*, 23 Beav. 53; s. c. on appeal, 3 Jur. N. S. 321; *Peters v. Lewes, &c. R. Co.*, 16 Ch. D. 703; 18 Ch. D. 429; *Re Cotton's Trusts*, 19 Ch. D. 624, 629; *Re Tweedie*, 27 Ch. D. 315; *Heard v. Read*, 171 Mass. 374.

On the classes of cases mentioned both in this and in the preceding section, see also Sugd. Pow. (8th ed.) 846-851; *Marsden*, Perp. 241-

243; 3 Dav. Prec. Conv. (3d ed.) 570-577. Cf. *Lewis*, Perp. c. 25; Suppl. 194-200. Neither in his original treatise nor in the Supplement does Mr. Lewis treat this subject satisfactorily. Both the treatise and the Supplement were published before the decision in *Lantsbery v. Collier*.

¹ § 232, *ante*.

² 4 Hare, 344.

³ 4 Hare, 373-381.

structible; the fact that the tenant was a minor did not affect the question.¹

§ 503. Sir James Wigram suggested, hesitatingly, a distinction between the power in the case before him and powers of sale and exchange and of leasing, on the ground that the latter do not tend to restrain alienation.² But the impossibility of sustaining these latter on that ground has been shown above.³

§ 504. In *Briggs v. Oxford*⁴ land was settled in estates tail, and trustees had a power to cut and sell timber in discharge of incumbrances. The Lords Justices held that the power was good.⁵ They did not overrule *Ferrand v. Wilson*, but they do not seem to have approved of it. Lord Cranworth, L. J., said: "If the law be not that a power is always good so far as perpetuity is concerned, if it is capable of being barred by a common recovery, or by that which is now equivalent to a common recovery, perhaps it is a matter of regret that that is not the state of the law. If there are any exceptions to that rule, I think they have created more embarrassment than is compensated for by any benefit which they have produced." ⁶

§ 505. In *Floyer v. Bankes*⁷ by a settlement land was given to trustees for five hundred years, and, subject to this term, on estates for life and in tail; and it was provided that during the minority of any person who should from time to time be entitled under the limitations in the settlement to the immediate freehold as tenant for life or in tail, the trustees of the term might enter into possession of and manage the same and apply the rents (amongst other things) in improving the property. Lord Romilly, M. R., said, *obiter*, that this right of the trustees to enter was "clearly too remote." As the

¹ §§ 443, 444, *ante*.

² 4 Hare, 381.

³ § 489, *ante*.

⁴ 1 De G. M. & G. 363.

⁵ See § 486, *ante*.

⁶ See also Lewis, *Perp. Suppl.* 196-199; Marsden, *Perp.* 244, 245; Farwell, *Pow.* (2d ed.) 110-112.

⁷ L. R. 8 Eq. 115.

right could not be exercised after the expiration of the estates tail, and as these could be barred at any time, there was no objection on principle to the right; but the *dictum* was in accordance with the decisions in *Browne v. Stoughton*,¹ *Turvin v. Newcome*,² and *Cochrane v. Cochrane*,³ previously considered,⁴ which go upon the unsatisfactory ground that the term precedes the estates tail.⁵

§ 506. To sum up the law as to powers in connection with settled property: 1. Sometimes the power ceases as soon as the equitable fee or absolute interest vests in possession. 2. Sometimes the power can be exercised only until the owner of the equitable fee or absolute interest calls for the legal estate or interest.⁶ 3. Sometimes the power can be exercised within a reasonable time after the fee or absolute interest has vested in possession, such reasonable time being not over twenty-one years after lives in being.⁷ 4. Sometimes the power is created to be exercised on a contingency which may happen after the legal fee or absolute interest has vested in possession (or after the time when the owner of the equitable fee or absolute interest can call for the legal estate or interest), and which may be more than twenty-one years after a life in being. In the first three cases the power is not void for remoteness; in the last it is. The ordinary powers of sale and exchange and of leasing come under one of the first two heads. It requires the clearest evidence of intention to bring a power under the fourth head.

§ 507. The case of *Peters v. Lewes, &c. R. Co.*⁸ is instructive. There a power to sell and distribute on the termination of a life estate was said by Sir George Jessel, M. R., to be a valid power, and one which survived the termination of

¹ 14 Sim. 369.

² 3 K. & J. 16.

³ 11 L. R. Ir. 361.

⁴ §§ 466, 467, *ante*.

⁵ §§ 456-462, 471, 472, *ante*.

See 3 Dav. Prec. Conv. (3d ed.)

483, note; Marsden, Perp. 159;

Farwell, Pow. (2d ed.) 113; Trevelyan v. Trevelyan, 53 L. T. R. 853.

⁶ § 490, *ante*.

⁷ § 491, *ante*. Cf. § 500, *ante*.

⁸ 18 Ch. D. 429, reversing 16 Ch. D. 703.

the life estates. He held, therefore, that it did not belong to the first class. He thought it valid because it belonged to the third class. He might also have held it valid as belonging to the second class. He says: "I agree if all the children, being free from disability, concur in calling upon the trustees to convey, that puts an end to the trust, and, of course, to the power also. It puts an end to the trust to divide."¹ Had it been made to appear that it was the intention of the testator that the power might be exercised more than twenty-one years after the legal estate had vested, it would have been bad as belonging to the fourth class.²

§ 508. In *Barnum v. Barnum*³ a power to trustees to lease was held bad, because the trust was considered bad. But, as has been shown,⁴ the trust was good, until terminated by the *cestuis que trust*, and because it was so terminable. The power was therefore good under the second head in § 506, *ante*.

§ 509. Powers to appoint new trustees, although not expressly limited in time, are yet not void. The reason sometimes given⁵ that it is immaterial by whom the trusts are executed is "an equitable answer to a legal objection."⁶ The true reason is the same which governs powers of sale and exchange and of leasing, that as soon as the *cestuis que trust* call for and receive the legal estate the trust is at an end and the power necessarily ceases.⁷

§ 509 *a*. The question of remoteness of powers for sale has lately been quite frequently before the courts. Before considering the cases, attention should be called to the point remarked upon above in the chapter on Trusts;⁸ that so far as concerns the Rule against Perpetuities it is immaterial

¹ 18 Ch. D. 434.

² Cf. Lewis, Perp. 565-569.

³ 26 Md. 119, 172, 173.

⁴ § 245 *c* (1), *ante*.

⁵ Marsden, Perp. 247; 2 Chance, Pow. § 2588.

⁶ See 1 Hayes, Conv. (5th ed.) 498.

⁷ See § 490, *ante*. Cf. *Clark v. Platt*, 30 Conn. 282. As to the right to enter on default of payment of rent, see § 303, *ante*.

⁸ 414 *a*, *ante*.

whether the direction or authority to sell be in the form of a trust to sell, or of a power to sell in the trustee, or of a power to sell given to a stranger.

§ 509 *b*. In *Goodier v. Johnson*¹ a testator directed that upon the death of his son, of his daughter, and of any widow of his son, his trustees should sell his land and pay the proceeds to certain persons. As the son might marry a woman unborn at the testator's death, his widow might not die until after the period fixed by the Rule against Perpetuities. The testator's heir brought a bill on the ground that the devise was void because the class of persons who were to take were to be ascertained at too remote a period. The Court were of opinion that on the true construction of the will the class would be ascertained within the required limits, and "merely made a declaration that the heir had no title." But, Jessel, M. R.,² said, "It seems to me, however, that the trust for sale is bad, as it is not limited to take effect within the period of a life in being and twenty-one years after." As far as appears this *dictum* was correct. Although the class ultimately to take would be ascertained within lives in being, yet they would not be then entitled to call for a conveyance, and thus destroy the power; the trust, so far as appears, might not be terminable until the death of the son's widow; the power would be indestructible till that time, and was therefore too remote.³

§ 509 *c*. In *re Tweedie*.⁴ Land was settled on trustees in trust, and at the request of A. and B. and the survivor, and after their death at discretion, to sell and hold the proceeds upon trust for A. and B. for life, and then for their children. Pearson, J., held that after the death of A. and B. the trustees could sell without the concurrence of the children. It was argued that the power came to an end with the death of A. and B.; that if it did not it would be too remote. The judge

¹ 18 Ch. D. 441. It is stated more fully, § 388, *ante*.

² P. 449.

³ See *Re Coulson's Trusts*, 97

L. T. R. N. S. 754. Cf. § 509 *c*, note, § 509 *i*, note, *post*.

⁴ 27 Ch. D. 315.

said that to hold that such a trust "is obnoxious to the rule against perpetuities would be to introduce a rule which has never yet been laid down." It does not appear whether the learned judge thought the power good because the children could destroy it, by calling for a conveyance, or because it must be exercised within a reasonable time after the death of the life tenants and that such reasonable time was less than twenty-one years.¹

§ 509 *d. Goodier v. Edmunds.*² In this case there came again before the court the will which was before it in *Goodier v. Johnson*, and the question was directly presented whether the power to sell was too remote. Stirling, J., followed the *dictum* of Sir George Jessel, M. R., and held that the power was invalid. He said, after quoting the language of the Master of the Rolls, "With the exception of the passage just quoted, there was not cited in argument, nor have I been able to discover, any authority bearing on the question." As is said above,³ there is no occasion to criticise this decision.

§ 509 *e. In re Henzell.*⁴ A testator devised land on trust for his wife for life, and, on her death, the will, as construed by the court, gave his children vested interests. The trustees had a power at any time, but, during the wife's life, only with her consent, to sell the land. The wife died in April, 1887. Kay, J., "referred to the observations of Jessel, M. R., in *Peters v. Lewes, &c. R. Co.*,⁵ and held that the power endured during the life of the tenant for life with her consent, and after her death during a reasonable time for the purposes of division, and that, as she had recently died, the power was still exercisable." The learned judge apparently thought that the power subsisted for only a reasonable time after the death of the life tenant, and was therefore valid.

¹ That a power to sell in trustees is not put an end to during the life of the tenant for life, by the fact that the persons entitled in remainder have vested interests, see

Biggs v. Peacock, 20 Ch. D. 200; 22 Ch. D. 284.

² [1893] 3 Ch. 455.

³ See § 509 *b*, *ante*.

⁴ [1887] W. N. 240.

⁵ 18 Ch. D. 429, 435; § 507, *ante*.

§ 509 *f. In re Daveron*.¹ A testator devised land to trustees, subject to a lease which had forty-nine years unexpired, upon trust to pay the rent so long as the lease should run to a certain class, and upon the expiration of the lease, to sell the land and pay the proceeds to another class. Both classes were ascertainable within the limit of the Rule against Perpetuities. Counsel admitted that the power was too remote, and Chitty, J., said that the admission seemed to him correct, and this appears to be so. The power was not destructible, for the class entitled to the proceeds of the sale could not demand a conveyance of the estate free from the lease.²

§ 509 *g. In re Sudeley*.³ Real and personal property was given to trustees in trust to pay the income to certain persons for life, and on their death to divide the property among certain other persons, with power in the trustees to sell any of the property at such times as they saw fit. Chitty, J., held that the power could be exercised after the deaths of the life tenants, but that, as it must be exercised within a reasonable time after those deaths, which was less than twenty-one years, it was not too remote. The learned judge thought that the opinion of Jessel, M. R., in *Peters v. Lewes, &c. R. Co.*⁴ was good law, and followed it.

§ 509 *h. In re Wood*.⁵ Land was devised to trustees in trust to sell it at a period which might be too remote, and to hold the proceeds in trust "for such child of mine then living, and such issue living of any child or children then deceased, as shall, being a son or sons, attain the age of twenty-one years, or, being a daughter or daughters, attain that age or marry, in equal shares, but so that the issue of my deceased children may take the share or the respective shares only that the parent or respective parents would have taken if living." Although the maximum number of shares must have been determined within the required limits of the Rule against Perpetuities,

¹ [1893] 3 Ch. 421.

⁴ 18 Ch. D. 429, § 507, *ante*.

² See § 509 *c*, note, *ante*.

⁵ [1894] 2 Ch. 310; [1894] 3 Ch.

³ [1894] 1 Ch. 334.

(C. A.) 381.

the minimum might not,¹ and therefore there might not be, within the required limits, any persons who could demand a conveyance, and so destroy the power. The power was, of course, held too remote.²

§ 509 *i*. *In re Appleby*.³ This was a case like *Goodier v. Johnson*,⁴ where a power was exercisable during a life not in being at the creation of the power. The remainder-men, although their interest was vested, could not call for a conveyance during the continuance of the life, and this power was held void.⁵

§ 509 *j*. In England, therefore, powers which can be exercised only within a reasonable time after lives in being, which time is less than twenty-one years, are good. So if land is settled in tail, powers which can be exercised only during the continuance of the estates tail are not too remote. That powers which can be destroyed by those equitably interested in an estate demanding a conveyance are not too remote, seems never to have been directly held in England, but there is no decision inconsistent with such a view.⁶

§ 509 *k*. To come to the American cases. *Seamans v. Gibbs*.⁷ Land was conveyed to a trustee with power to sell and divide the proceeds among those having the equitable interest. There was no limit as to the time within which the power could be exercised. One of the equitable owners brought a bill against the trustee to compel a conveyance. It was held that one

¹ See §§ 381 *et seq.*, *ante*.

² A like decision was made in *Dawson v. Lancaster*, 28 Pa. C. C. 657. So in *In re Bewick*, [1911] 1 Ch. 116, where there was a trust to sell, after mortgages had been paid out of rents.

³ [1903] 1 Ch. (C. A.) 565.

⁴ See § 509 *b*, *ante*.

⁵ "It may happen that a trust is bad, and that the persons intended to be benefited by it are, nevertheless, entitled to the prop-

erty." 1 Jarm. Wills (6th ed.) 308. *Re Daveron*, [1893] 3 Ch. 421. *Goodier v. Edmunds*, *Ib.* 455. *In re Appleby*, [1903] 1 Ch. (C. A.) 565. See App. I, *post*; 37 Ir. L. Times, 294, 304, 314.

⁶ But there is a *dictum* by Sir John Romilly, M. R., *Taite v. Swinstead*, 26 Beav. 525, 529. See 1 Wms. Vend. & P. (2d ed.) 263.

⁷ 132 Mass. 239. See *O'Rourke v. Beard*, 151 Mass. 9.

owner could not compel a conveyance. The Court also said: "The case does not come within the rule against perpetuities." The reason given, however, was not very satisfactory. "An inalienable estate was not created by the deed and declaration of trust, which could not be conveyed even if all the parties in interest joined in conveying. The trustee, by the terms of his deed, could convey the estate discharged of the trust, or all the parties in interest could at any time pass the title, by joining in a conveyance." The true reason, it is submitted, was because all the equitable owners could demand a conveyance from the trustee.

§ 509 *l*. When property is held in trust for several persons who are to have interests in common, the authority of the trustee to sell free from equities is limited by the terms of the trust; if the authority is not expressly given, the trustee's legal right to sell will bar equities only if all the equitable owners consent. This is one of the incidents of equitable ownership in common; that relation has its own incidents, just as legal ownership in common, or the interest of a stockholder in a corporation, has its own incidents, and if the interest of each equitable owner is freely alienable, neither the Rule against Perpetuities nor the doctrine forbidding restraints on alienation has anything to do with the situation.¹

§ 509 *m*. *Winsor v. Mills*.² P. agreed that he would hold an undivided third of a parcel of land belonging to him, in trust for M., and covenanted that he would not sell the land or any interest therein, without the consent of M., his heirs or assigns. This forbade him to transfer his own two-thirds interest without the consent of M., his heirs or assigns, and the Court held that this right in M., his heirs or assigns, to refuse consent was too remote.

§ 509 *n*. There were *dicta* in *Winsor v. Mills* which might be interpreted as going beyond this, but any erroneous infer-

¹ See *Hutchison's Appeal*, 82 491, 506; *Gray, Restraints on Alienation*, § 30.
Pa. 509; *Howe v. Morse*, 174 Mass.

² 157 Mass. 362; § 275 *a*, *ante*.

ence from them is corrected by *Howe v. Morse*.¹ In this case land was conveyed to trustees in trust to sell when authorized by three-fourths of the *cestuis que trust*. The shares of these *cestuis que trust* were freely transferable. It was held that the trust was valid.

§ 509 o. *Cooper's Estate*.² A testatrix gave all her property to a trustee in trust to divide the income of the property, and also the proceeds of the real estate, among certain persons. The trustee had power to sell, and no time was fixed within which the power must be exercised. The Supreme Court of Pennsylvania held that the power was valid. They said: "We are unable to see anything in this trust which is in conflict with the law in regard to perpetuities. The mere fact that no time is fixed within which the power of sale must be exercised, does not of itself create a perpetuity. It is sufficient to say that a power to sell and distribute the proceeds, created by a will, must be exercised within a reasonable time. . . . Aside from this, it was competent for all the parties in interest at any time to defeat the power and to take the property discharged thereof. Under these circumstances, we cannot say that the trust created a perpetuity." ³

§ 509 p. *Hart v. Seymour*.⁴ Land was conveyed to trustees in trust to improve and sell and to divide the proceeds among certain persons. The time of sale was left wholly in their discretion. It was held that there was no violation of the Rule against Perpetuities.

§ 509 q. *Barber v. Pittsburgh, &c. R. Co.*⁵ A power to be exercised on the termination of an estate tail was held good.

§ 509 r. The most important case is *Pulitzer v. Livingston*.⁶ The owners, tenants in common, of land conveyed it to trustees with power to sell. Each tenant in common had, by the trust deed, power to revoke the trusts as to his share. The

¹ 174 Mass. 491.

² 150 Pa. 576.

³ And so is *Reed's Est.*, 37 Pa. C. C. 205.

⁴ 147 Ill. 598. See *Bigelow v. Cady*, 171 Ill. 229, § 237 c, *ante*.

⁵ 166 U. S. 83.

⁶ 89 Me. 359.

Supreme Court of Maine in an elaborate opinion upheld the validity of the power. They rested their judgment on the fact that the power was destructible at the pleasure of the present equitable owners, who were "entitled to call for a conveyance of the legal estate from the trustees and thereby to destroy and finally determine the trust."¹ It is true that each tenant in common could demand a conveyance of his separate share, but that, as pointed out above,² does not affect the question.³

§ 509 s. On powers to sell for change of investment, given to trustees for charitable trusts, see § 590, note 3, *ad fin.*, *post*.

2. *A Power which cannot be exercised beyond the Limits of the Rule against Perpetuities is not rendered bad by the Fact that within its Terms an Appointment could be made which would be too remote.*⁴

§ 510. A common illustration of this is a devise to a man for life, with remainder among such of his issue as he shall by will appoint. If he appoints to his children in fee, the appointment is good, although if he appointed to children who were not born at the testator's death, for their lives, with remainder to their children in fee, this appointment to the grandchildren would be bad for remoteness. If this were not the law, all general powers and most special powers would be void.

¹ P. 369.

² See § 509 *l. ante*.

³ In view of the foregoing decisions, as well as of sound doctrine, the common practice of confining trusts for the management and sale of real estate to limits expressly within the Rule against Perpetuities seems unnecessary.

By a doctrine peculiar to Massachusetts and Illinois a trustee will sometimes be not required to convey the legal fee to a *cestui que trust*, although the latter has the

absolute equitable interest. On this doctrine in connection with the Rule against Perpetuities, see §§ 121 *c.*, *et seq.*, *ante*.

⁴ See *Stone v. Forbes*, 189 Mass. 163, 172; *Bartlett v. Sears*, 81 Conn. 34, 41. Cf. a singular instance of the confusion of this second rule with the previous rule (p. 397, *ante*) in a note, 29 Law Quart. Rev. 13, which is justly criticised, 26 Harv. Law Rev. 648 and 30 Law Quart. Rev. 66.

There are comparatively few powers under the terms of which remote appointments could not be made.¹

3. *The Remoteness of an Appointment depends on its Distance from the Creation and not from the Exercise of the Power.*

§ 514. If this were not the case, estates for life with powers of appointment by will might be created; the tenants for life might appoint for life, with powers to the appointees to appoint by will; these appointees might, in their turn, appoint in like manner, and so an indefinite series of life estates could be created.

§ 515. "No estate or interest can be limited under a particular power, which would have been too remote, if limited in the deed or will creating the power."² "The test of the validity of the estates raised is to place them in the deed creating the power, in lieu of the power itself."³ This does not mean that the language of the instrument executing the power must be read into the instrument creating it. To do this would often produce manifest absurdity, though the limitations were of the most unobjectionable character. Events future at the time of the creation of the power would be spoken of as past; gifts would be made by name to persons not in existence. What these expressions mean is that *no appointment made under a power is good, unless at the time of the creation of the power it was certain that if the appointment was ever made*

¹ See *Routledge v. Dorril*, 2 Ves. Jr. 357; *Griffith v. Pownall*, 13 Sim. 393; *Harvey v. Stracey*, 1 Drew, 73, 131; *Attenborough v. Attenborough*, 1 K. & J. 296, 300; *Slark v. Dakyns*, L. R. 10 Ch. 35; *In re Fane*, [1913] 1 Ch. (C. A.) 404; *Hillen v. Iselin*, 144 N. Y. 365, 380; *Lawrence's Estate*, 136 Pa. 354, 364; *In re Hobson's Will*, [1907] Vict. L. R. 724, 736; *Fonseca v. Jones*, 21 Manitoba, 168, 190;

Lewis, Perp. 487, 488; Suppl. 166; *Sugd. Pow.* (8th ed.) 152, 397; *Marsden*, Perp. 236, 237; 1 *Jarm. Wills* (5th ed.) 260; *Tud. L. C. in Real Prop.* (4th ed.) 607; 1 *Perry*, *Trusts* (6th ed.) § 383, note. Cf. *Warwick v. Gerrard*, 2 Vern. 7; *Re Coulman*, 30 Ch. D. 186.

² *Lewis*, Perp. 488.

³ *Sugd. Pow.* (8th ed.) 396. See *In re Hallinan's Trusts*, [1904] 1 I. R. 452; 38 Ir. L. T. 291.

*the appointee's interest would vest, if at all, within twenty-one years after lives then in being.*¹

§ 516. Consequently when the donee of a power is alive at the time of its creation, as he generally is, an appointment which is to take effect immediately upon (or within twenty-one years after) the donee's death is good. Thus if an estate is devised to A. for life, with power to appoint among such of his issue as he chooses by will, A. can appoint to the remotest descendants of his who are alive at his death, although neither they, nor their parents, nor their grandparents were alive at the testator's death. For the interest of the appointees vests at A.'s death, and A. was alive at the testator's decease.²

§ 517. Mr. Lewis in his Treatise on the Rule against Perpetuities has the following passage: "A question seems to arise, as to how far an appointment would be good, if made to the child of a person unborn at the time of the creation of the power, *living at the date of the appointment, and specifically named in it.* The difference between such an appointment, and those before illustrated, is, that the frame and tenor of the appointment, from the nature of the case, do not supply the restrictive protection from the violation of the Rule against Perpetuities which would have been necessary, were the limitations incorporated into the instrument creating the power, in lieu of that power, and which is ordinarily necessary in every *appointment* made to an *unascertained class* of issue, the children of a person unborn at the time of the creation of the power. Supposing the gift to be to the first, second, or third grandchild, it is evident that no such limitation could have been inserted in the deed creating the power, unless it were provided that the object of the gift should come *in esse*, within some life or lives in being and twenty-one years. The fact that, at the time of the appointment, such

¹ See §§ 523 a, 523 b, *post*; 1 Jarm. Wills (6th ed.) 315, 318.

² Routledge v. Dorril, 2 Ves. Jr. 357. Harvey v. Stracey, 1

Drew. 73, 133-137. Sugd. Pow. (8th ed.) 397. Lewis, Perp. 488;

§§ 523 a, 523 b, *post*.

grandchild has actually come *in esse*, within a life in being, cannot be regarded, in reference to the question of the validity of the appointment; as the limitation must be considered, in all respects, as if it had formed part of the original settlement, and, at the time of that settlement, it could not be predicated, with certainty, that any grandchildren would be born within the boundaries of legal remoteness. It seems, therefore, an inevitable conclusion, that a gift, such as that alluded to, must be treated as void for remoteness, although, in fact and reality the Rule against Perpetuities is not violated by it. The same conclusion must, also, be arrived at, with respect to an appointment to the children of a child unborn at the time of the creation of the power, when that child *dies previously to the appointment*, and when, therefore, *according to the course of events*, all objection, on the score of remoteness, to the appointment, is, in fact, precluded; although, as such a gift could have been void, if originally limited, instead of the power, it is clearly insupportable.”¹

§ 518. In spite of the weight which any opinion of Mr. Lewis justly carries, these propositions, for which no authority is cited, are, it is submitted, unsound. Suppose an estate is devised to A. for life with power to appoint by will, and A. desires to appoint to J. S., who is the child of a person unborn at the death of the testator. Now, according to Mr. Lewis, if A. says, “I appoint to J. S., if J. S. is born before my death,” the appointment is good.² But if he says “I appoint to J. S.” the appointment is bad, although J. S. is living at the time of the appointment. Or, in other words, an appointment to a man actually living at the time of the appointment is bad, unless the silly words “if he is born before the appointment” be added, and this when the very language of the appointment shows that he is alive.³

¹ Lewis, Perp. 491, 492.

² See Lewis, Perp. 489, 490.

³ Mr. Lewis's error seems to have sprung from his confounding

the question of the meaning of an appointment with the question of the validity of an appointment. See §§ 523 *a*, 523 *b*, *post*.

§ 519. That Mr. Lewis's theory is not law appears from the case of *Morgan v. Gronow*.¹ There A., by virtue of a power in his marriage settlement, appointed a fund upon a trust to take effect on the marriage of his daughter E. E. subsequently married, and he then reappointed the fund upon the same trusts. Lord Selborne, C., sitting for the Master of the Rolls, held that the first appointment was void, but that as E. had become married during the lifetime of the donee and before the reappointment, the reappointment was good; yet a limitation in the original settlement to a daughter of A. on her marriage would have been too remote. The law therefore may be considered as settled against Mr. Lewis's theory, especially in view of the absurd consequences of that theory.²

§ 519 *a*. Indeed Mr. Lewis, with his accustomed candor, makes an admission which is fatal to his case. He says that, "in fact and reality, the Rule against Perpetuities is not violated by" the appointment in question. But the only objection to the appointment is its remoteness. If it is not remote, what right has any court to say "it must be treated as void for remoteness"? The law of remoteness is not based on fictions.

§ 520. In applying the Rule against Perpetuities, a difference between the creation of powers by deed and by will should be noted. Under a power in a marriage settlement an appointment cannot be made to grandchildren of the parties unborn at the time of the appointment, for such grandchildren's parents were not born at the creation of the power;³ but under a power in a will an appointment can be made to grandchildren of the testator, although unborn at the time of the appointment, because their parents cannot be born after the creation of the power.⁴

¹ L. R. 16 Eq. 1. And so *In re Coulman*, 30 Ch. D. 186; § 523 *f*, *post*.

² But see *Smith's Appeal*, 88 Pa. 492; § 523 *post*.

³ 1 Jarm. Wills (6th ed.) 317, note.

⁴ *Lewis, Perp.* 492, 493. *Sugd. Pow.* (8th ed.) 397.

§ 521. The question of remoteness often comes up when under a power an appointment is made to A. for life, remainder as he shall by will appoint. Here, if A. was alive at the time of the creation of the original power, the power given to him is good.¹ But if A. was not born at the time of the creation of the original power, the power given to him is too remote.²

§ 522. Other cases where appointments have been held too remote, under special powers in marriage settlements and in wills, are given in the note.³ For cases under general powers, see §§ 524 *et seq.*

¹ *Phipson v. Turner*, 9 Sim. 227. *Slark v. Dakyns*, L. R. 15 Eq. 307; L. R. 10 Ch. 35. See *Peard v. Keke-wich*, 15 Beav. 166; (see *Marsden*, Perp. 28, 29, 80, 251; Gray, *Restraints on Alienation*, (2d ed.) § 109 b); *Bell v. Bell*, 13 Ir. Ch. 517. In *Morse v. Martin*, 34 Beav. 500, the first appointee was, undoubtedly, alive when the power was created, although this does not directly appear, for no objection of remoteness was taken.

² *Wollaston v. King*, L. R. 8 Eq. 165. *Morgan v. Gronow*, L. R. 16 Eq. 1. *Whitby v. Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85. *Treden-nick v. Tredennick*, [1900] 1 I. R. 354. See §§ 526–526 c, *post*.

³ *Under marriage settlements*. — *Brown & Sibly's Contract*, 3 Ch. D. 156. *Massey v. Barton*, 7 Ir. Eq. 95. See *In re Hallinan's Trusts*, [1904] 1 I. R. 452; 38 Ir. L. T. 291. *Whitby v. Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85. *In re Gage*, [1898] 1 Ch. 498. *Whitby v. Von Luedecke*, [1906] 1 Ch. 783. *Re Crichton's Settlement*, 56 Sol. J. 398; 106 L. T. R. 588. *Hutchinson v. Tottenham*, [1898] 1 I. R. 403, 418. In this last case, a testatrix, who, under her marriage settle-

ment had power to appoint to any issue of the marriage born in her lifetime, appointed to her daughter S. for life, on S.'s death to S.'s children born in the lifetime of the testatrix, provided that if S. died without leaving any such children, then to C. and E., granddaughters of the testatrix born in her lifetime. S. was never married. *Chatterton*, V. C., held that the appointment to C. and E. was good. This decision seems incorrect. The appointment to S. was good, so was the appointment to her children born in the lifetime of the testatrix, because it gave a vested interest to a class determined not later than the death of the testatrix, but the gift over to C. and E. was on the condition precedent that S. left at her death no such children, and that was a condition which, looking to the time of the marriage settlement, was too remote. It does not seem possible to separate the contingency of S.'s not having such children from that of her having such children and of their predeceasing her. See §§ 331 *et seq.*, *ante*.

Under wills. — *In re Coulman*, 30 Ch. D. 186. *D'Abbadie v.*

§ 523. In *Smith's Appeal*¹ A. devised property in trust for B. for life, and on her death as she should by will appoint. B. appointed to trustees in trust for her children for life without liability for their debts, and directed that on the death of each child its share should go over. All B.'s children had been born in the lifetime of A. The gifts over were held void for remoteness. But, with submission, this was incorrect. The Court say that B. might have had children who were not born till after A.'s death. But at B.'s death, when the appointment took effect, her children were a fixed number which could neither be increased nor diminished; "children" was simply a compendious designation for certain determined individuals. It will not be questioned that if B. had appointed the property to John, Thomas, Mary, &c., naming all her children, all of them having been born in the lifetime of A., the gift over on their death would have been good; for it would have been good if inserted *totidem verbis* in the will of A. Now that is exactly what she has done: the words of gift to all the children, as used by B., are identical in meaning with words appointing to John, Thomas, Mary, &c. They have not merely turned out to be the same (which would not be enough), but they could never mean anything else; for at her death, when the words of her will became operative, her children were John, Thomas, Mary, &c., and could never be anybody else.

Bizoin, Ir. R. 5 Eq. 205. Thomson v. Livingston, 4 Sandf. 539. *Smith's Appeal*, 88 Pa. 492. *Boyd's Estate* (No. 1), 199 Pa. 487. *Albert v. Albert*, 68 Md. 352. *Thomas v. Gregg*, 76 Md. 169. *Graham v. Whitridge*, 99 Md. 248. *Reed v. McIlvain*, 113 Md. 140. See *Brown v. Columbia Finance Co.*, 123 Ky. 775.

And in general see *Harvey v. Stracey*, 1 Drew. 73, 133-137; *Lewis*, Perp. 484, 485, 488-492; *Sugd. Pow.* (8th ed.) 31, 195, 196, 396; *Marsden*, Perp. 250-254. At

the bottom of page 250 of *Marsden on Perpetuities* it is said: "Thus if A., being childless at the creation of a power of appointment amongst children, appoints to her son B., for life, with remainder to her son, C., in fee, the appointment to C. is void for remoteness." This is obviously a slip of the learned author. C.'s remainder vests on the execution of the power at the same time as B.'s life estate. They are both alike good. §§ 205, 206, 476 b, *ante*.

¹ 88 Pa. 492.

The decision in *Smith's Appeal* makes the question turn upon whether B. used one of two expressions, which, in her will, would have precisely the same meaning; and the reason for this distinction is that the words, if used by A., would not have had the same meaning. There is no question of public policy involved. B. could confessedly have accomplished her object, if she had used words which in her will would mean exactly the same as the words she has used, neither more nor less; not, it must be again observed, words which have turned out to mean the same, but words which at and from the time of their going into effect could never possibly mean anything else. Such verbal and arbitrary distinctions are entirely opposed to the spirit of the Rule against Perpetuities, which, though severe, is rational.¹ *Morgan v. Gronow* is opposed to *Smith's Appeal*.²

§ 523 *a*. Mr. Lewis's remarks³ and the decision in *Smith's Appeal* seem to have been prompted by confounding two separate questions: (1) What appointment is in fact made? (2) Was it certain at the time of the creation of the power that such appointment, if made, would vest within twenty-one years after lives in being? The first question is to be determined by considering what the language of the appointment means as used by the donee, at the time he uses it; and thus having found out what appointment the donee means to make, the second question is to be asked, viz.: was it certain, when the power was created, that, if the donee should ever make the appointment he has in fact made, it must vest within the required limits? Therefore all present unconditioned appointments by a donee living when the power was created are good; for they take effect, if by deed, in his lifetime; if by will, immediately on his death. So all appointments on the death of persons living when the power was created are good. It makes no difference that the appointment is in form

¹ See §§ 515 *et seq.*, *ante*; *Morgan v. Gronow*, L. R. 16 Eq. 1; § 519, *ante*.

² And so is *In re Coulman*, 30 Ch. D. 186; § 523 *f*, *post*.

³ 517, *ante*.

to a class, if the class is closed before the appointment, as in *Smith's Appeal*; or that a condition is in terms attached to the appointment, if the condition is in fact fulfilled before the appointment, as in *Morgan v. Gronow*. The error in *Smith's Appeal* was that the Court went to the creation of the power, not only to determine the validity of the appointment (which was right), but to determine the meaning of the appointing instrument (which was wrong). It considered not what the words of appointment meant as used by the donee, but what they would have meant if used by the creator of the power.

§ 523 *b*. The happily turned but ambiguous phrase that an appointment should be considered "as if written into the original instrument" was, probably, the source of the error.¹ The statement is true if understood of the validity of an appointment. It is not true if understood of the meaning of the words used in making an appointment. The Court, in *Smith's Appeal*, seems to have adopted and applied the expression without sufficient consideration of its true force; and consequently a wholly proper gift was rendered void by the imposition of an arbitrary requirement, not called for by the Rule against Perpetuities nor by public policy. These were perfectly protected by subjecting the appointment to the test given in the preceding section. And what was this arbitrary requirement? It was that words were not to be given the meaning which they really had when used by the person using them, but the meaning which they would have had if used at some other time by some other person. That is, a fiction was invoked, for no useful end, to defeat a lawful object. It is easier to believe that the decision passed *per incuriam* than that the learned Court deliberately contemplated such a result. The history of the Rule against Perpetuities is full of slips by eminent judges, often acknowledged by themselves.²

¹ See *White v. Commissioner for Stamps*, 8 N. S. Wales State Rep. 287, 292.

² It was also held in *Smith's Appeal* that not only the gifts over on the death of B.'s children, but

§ 523 c. In *Wilkinson v. Duncan*¹ W., who died in 1836, bequeathed the residue of his personal estate to trustees on trust for his nephew G. for life, and on G.'s death on trust for such one or more of G.'s children as G. by deed or will should from time to time appoint. G. by will, made in 1858, appointed £2,000 to each of his daughters when they should respectively attain twenty-four years. G. left four daughters, all infants, three being more and one less than three years of age.² Lord Romilly held that each of the daughters who was over three years of age took £2,000 when she reached twenty-one years. This case has been followed in *Von Brockdorff v. Malcolm*,³ *In re Thompson*,⁴ *In re Hallinan's Trusts*,⁵ and *White v. Commissioner for Stamps*.⁶

§ 523 d. These decisions seem correct. The appointment was to each daughter, as much as if she had been mentioned by name, to her with all her qualities, among which was that

that the life estates appointed to them by their mother, were too remote. This was certainly wrong. See § 239, *ante*. Cf. *Gardette's Estate*, 16 Phila. 264; 13 W. N. C. (Pa.) 315; § 239 a, *ante*. On this point *Smith's Appeal* has been overruled. *Lawrence's Estate*, 136 Pa. 354.

Further, the shares of B.'s children were separate and independent at the time of her death, and for this reason also the decision was wrong. See § 395, *ante*.

The author is indebted to the kindness of William Henry Rawle, Richard M. Cadwalader, and R. Mason Lisle, Esquires, of the Philadelphia Bar, for an instructive correspondence on *Smith's Appeal*. His learned friends are not, however, to be considered as in any way responsible for his conclusions. The correctness of the opinion in *Smith's Appeal* has been ques-

tioned by the learned Chief Justice who wrote it. *Coggins' Appeal*, 124 Pa. 10, 30, 31. See *Estate of Lawrence*, 136 Pa. 354, 367; 18 Am. & Eng. Enc. of Law (1st ed.) 357, 358; *Foulke, Treatise*, §§ 395 *et seq.*

¹ 30 Beav. 111; s. c. 7 Jur. N. S. 1182.

² This is not stated in *Beavan*, but appears in the report in the *Jurist*.

³ 30 Ch. D. 172.

⁴ [1906] 2 Ch. 199.

⁵ [1904] 1 I. R. 452; see 38 Ir. L. T. 291. And see also 1 Jarm. Wills (6th ed.) 330. On *In re Wright*, [1906] 2 Ch. 288, see 23 Law Quart. Rev. 9; 11 Enc. Laws of Eng. (2d ed.) 75; 1 Jarm. Wills (6th ed.) 318.

⁶ 8 N. S. Wales State Rep. 287. See *Bartlett v. Sears*, 81 Conn. 34, 46.

she was over three years of age. If the bequest had been to G. for life, and on his death £2,000 to be paid to each of his daughters then over three years old who should reach twenty-four, such bequest would have been good, and by combining the original bequest and the appointment that is what we get. If the appointment is to a determined person, and if a gift to such person, with all his or her qualities, would be good if made in the original instrument creating the power, then the appointment is good. If there is any contingency in the appointment, then there will be the same contingency when it is read into the instrument creating the power, as, for instance, when there is an appointment by deed to the donee's children; but where there is no contingency in the appointment, then the original bequest is to a defined person, and if it is certain that a gift to such a defined person must take place, if at all, within the required limits then it is good.¹

§ 523 *e*. A limitation by means of a power and appointment is subject to the same rules as a limitation by direct gift; both have to be of such a nature from the beginning that they must vest, if at all, within the required period. The advantage of the power and appointment over the direct gift is that the donee of the power, acting at a later period, can effect a desired object by a limitation which will be good, although this could not have been foreseen when the power was created. For instance, suppose a testator desires that his grandchildren should not take until they are twenty-five, he can make a gift to those of his grandchildren, being four years old at his son's death, who reach twenty-five, but he will not want to do this, because it will cut off entirely grandchildren who may not be four years old at his son's death; but, if he gives a power to the son, then, if it in fact turns out that all the grandchildren are over four years old at the son's death, the son can appoint by will to those of his children who are four years old at his death (or, what is the same thing, to all his children), when they reach twenty-five, without the risk of omitting one.

¹ A note by the author, 5 Harv. Law Rev. 348, to the contrary, is unsound.

§ 523 *f*. The case of *In re Coulman*¹ involved the same principle. C. devised real estate to trustees in trust to sell and pay the interest of the proceeds to his wife for life, and on her death in trust to pay the proceeds unto such of his two daughters, "for such interest or interests, with such limitations over for or in favor of them or other issue" as his wife should by deed or will appoint. The wife by will appointed that half of the trust fund should be held in trust to pay the income to all the children living at her own decease of one of the daughters who had died before her, as tenants in common, for life, and that after the death of each child, the share to the income of which such child was entitled should be paid as such child should by will appoint, and in default of appointment to "his or her next of kin, exclusive of the husband of any married female child." There were four children of the deceased daughter, three only of whom were born in the lifetime of C. Pearson, J., held, that the appointments to the next of kin of those children of the daughter who were born within the lifetime of C. were not too remote; and that if the next of kin of any child turned out to be its issue, the appointment was warranted by the terms of the power; but that the gift to the next of kin of the child who was not born till after C.'s death was too remote.²

§ 524. If a power is given to A. to appoint property by deed or will to whom he pleases, he has the absolute control over it. He can deal with the property as if he owned it in fee. Therefore, in the execution of such a power, the remoteness of an appointment under it is to be judged from the point of time of its exercise, and not from the time of its creation. The appointment can be considered an appointment to the donee himself and then a settlement of his own property. The text-writers all agree that such is the law;³ and this opinion

¹ 30 Ch. D. 186.

² The headnote of this case is inadequate.

³ Lewis, Perp. 483, 484. Sugd.

Pow. (8th ed.) 394-396. Co. Lit. 271 b, Butler's note, VII. 2. Marsden, Perp. 250. 1 Jarm. Wills (6th ed.) 320. Theob. Wills (7th ed.)

is so eminently sensible and so in accordance with the spirit of the Rule against Perpetuities, that a contrary decision is not to be anticipated. The view of Mr. Powell in his note to Fearn¹, that the exercise of general powers is the same in the matter of perpetuity as that of special powers, has not had any following.

§ 525. A power which the donee can execute by deed or will, but which in its exercise is confined to certain objects, must, of course, be so exercised that the appointment will be good for the time of the creation of the power. The donee of the power never has the absolute control.

§ 526. Whether appointments under powers, general in their scope, but to be exercised only by will, must be referred to the date of the creation of the power, is a question not free from difficulty. In *Powell's Trusts*² property was devised by A. to B. for life, remainder as B. should by will appoint. James, V. C., held that the validity of an appointment by B. must be determined with reference to A.'s death. So when, under a power in a marriage settlement to appoint to children, an appointment is made to a child for life, remainder as the child shall by will appoint, it has been held that any appointment by the child must be referred to the date of the settlement, and is therefore bad.³ On the other hand, in Davidson's

610. 3 Dav. Prec. Conv. (3d ed.) 154, 155. Tud. L. C. in Real Prop. (4th ed.) 607, 608. Leake, Land Law, 458, 459. 1 Perry, Trusts (6th ed.) § 383, note. Foulke, Treatise, §§ 400, 401. See *Bray v. Bree*, § 447, *ante*; *Tredennick v. Tredennick*, [1900] 1 I. R. 354, 363. The case of *Mifflin's Appeal*, 121 Pa. 205, so holds. This is the first case in which the question is discussed by the Court. See *Lawrence's Estate*, 136 Pa. 354, 364. It should be observed that both in *Bray v. Bree* and *Mifflin's Appeal* the donee of the power to appoint

by deed or will in fact appointed by will.

¹ 2 Fearn^e, C. R. (4th ed.) 374.

² 39 L. J. Ch. 188.

³ *Wollaston v. King*, L. R. 8 Eq. 165. *Morgan v. Gronow*, L. R. 16 Eq. 1, 9, 10. *Genet v. Hunt*, 113 N. Y. 158. *Boyd's Estate*, 199 Pa. 487. *Reed v. McIlvain*, 113 Md. 140. *Tredennick v. Tredennick*, [1900] 1 I. R. 354. *Re Phillips*, 28 Ont. L. R. 94. See *Lawrence's Estate*, 136 Pa. 354, 364; *Bartlett v. Sears*, 81 Conn. 34, 42; *Perry, Trusts* (6th ed.) § 383, note; App. L., §§ 948 *et seq.*, *post*.

Precedents of Conveyancing,¹ it is said that until *Wollaston v. King*, an appointment such as was made in that case would have been considered not too remote; and in *Rous v. Jackson*,² Chitty, J., decided that when property was settled on C. for life, and at her death as she should by will appoint, the validity of an appointment by C. was to be determined only with reference to the date of C.'s will, and not of the settlement.

§ 526 *a*. It would seem to make no difference whether the donee of the general power of appointment by will takes it directly by deed or will, or whether he takes it as appointee under a special power. In either case, a devise or appointment to him in fee would have been good, and in both cases the question is whether a power of appointment by will (or a life estate, coupled with a power of appointment by will) can, so far as the Rule against Perpetuities is concerned, be substituted for the fee. Therefore *Wollaston v. King*, *Morgan v. Gronow*, and the other cases cited in note 3 to the preceding section stand together with *Powell's Trusts*³ in holding that appointments under a general power exercisable by will only must be referred to the time of the creation of the power, in opposition to *Rous v. Jackson*⁴ and the other cases cited in note 2.⁵

§ 526 *b*. And principle as well as the weight of authority seems to be with *Powell's Trusts*. Take, for instance, a devise by A. to B. for life, remainder as B. shall by will appoint, and B. appoints to C., who was not born when A. died, for life, remainder to such of C.'s issue as survive him. Regularly, the appointment is to be considered as if made at the date of the original instrument. If that be done, then we have

¹ 3 Dav. Prec. Conv. (3d ed.) 156, note. See Co. Lit. 379 *b*, Butler's note.

² 29 Ch. D. 521. *Rous v. Jackson* was followed by *In re Flower*, 55 L. J. Ch. 200, 53 L. T. R. 717; and by *Stuart v. Babington*, 27 Ir. L. R. 551. See Wms. Pers. Prop. (17th ed.) 413. See *Rous v. Jack-*

son, more fully stated, App. I, §§ 909 *et seq.*, *post*.

³ 39 L. J. Ch. 188.

⁴ 29 Ch. D. 521. See this case more fully stated, App. I, §§ 910 *et seq.*, *post*.

⁵ But see further §§ 956-962, *post*. The distinction taken in the first edition of this book seems not sustainable.

an estate to B. for life, remainder to C. for life, remainder to those of C.'s children who survive him. Such a gift to C.'s children would be bad. Now, it is true that when the donee of a power can exercise it by either deed or will, the question of remoteness does not date from the creation of the power; but this exception to the strict operation of the rule is made because the donee can at any time appoint to himself, and therefore is practically the owner. But here B. is not practically the owner; he cannot appoint to himself; he is, indeed, the only person to whom he cannot possibly appoint, for he must die before the transfer of the property can take place. Or, to put it in another way, the Rule against Perpetuities forbids the creation, directly or indirectly, of any future gifts upon a remote condition precedent; but it is a practical rule devoted to a practical object. When a man has the present absolute interest in property, he can deal with it without regard to the previous history of the title. In applying the Rule against Perpetuities to any settlement or devise he may make, it is unnecessary to consider what limitations the property was subject to before it came into his hands. And if a man has the present unconditioned right to acquire the present absolute interest, he is regarded by the Rule against Perpetuities as already having such interest. A tenant in tail is such a person; a donee of a general power exercisable by deed is also such a person. To this extent the Rule sacrifices form to substance; but the substance must be there. There must be a person who has the immediate right to become the present absolute owner. Such is not the case when the donee of a power can exercise it only by will. The general rule must govern unless the exception is made out, and the exception is not made out unless there be a present right to acquire the present absolute interest.¹ The question is further treated in Appendix L, §§ 948 *et seq.*, *post*.

§ 526 c. It might be suggested that the donee of a general power to be exercised only by will, has an immediate absolute

¹ See *Mifflin's Appeal*, 121 Pa. 205, 214, 215, 222, 223.

control of the estate by contracting to execute the power. But, apart from other objections, a contract to exercise a power to appoint by will cannot be decreed to be specifically performed.¹

§ 527. A general power exercisable by deed, but only by consent of third persons, is not equivalent to the ownership in fee, and is therefore treated like a special power.²

§ 528. If, by an indenture to which a person to whom an appointment can lawfully be made is party, an appointment is made to persons to whom it could not have been directly made, the appointment is nevertheless good if such party to the indenture could have lawfully made a transfer to those persons, had the property been appointed to him. That is, the indenture is considered as being really two instruments, — one an appointment to the person to whom the appointment could lawfully be made, and the other a conveyance or settlement by him.

§ 529. The question has always been discussed in the form whether the actual appointees were objects of the power. But it is obvious that in many of the cases the Rule against Perpetuities has been involved, although Jarman on Wills³ seems to be the only book, among either the reports or treatises, where attention is called to this.⁴ Thus suppose A., by his marriage settlement, has a power of appointing among his issue, and that, on the marriage of a daughter, by a settlement to which she and her husband are parties, A. appoints to her for life, with remainder to her children, the children will take, although a simple appointment to them would have been bad for remoteness.⁵

¹ See *Reid v. Shergold*, 10 Ves. 370; *In re Parkin*, [1892] 3 Ch. 510; *In re Lawley*, [1902] 2 Ch. 673; [1902] 2 Ch. (C. A.) 799; *sub nom.* *Beyfus v. Lawley*, [1903] A. C. 411; *Bentham v. Smith*, 1 Cheves, Eq. 33; *In re Walsh's Trusts*, 1 L. R. Ir. 320.

² *Webb v. Sadler*, L. R. 14 Eq.

533; L. R. 8 Ch. 419; § 440, *ante*. See Marsden, *Perp.* 253.

³ 1 Jarm. Wills (5th ed.) 259, note.

⁴ See, however, *Morgan v. Gro-now*, L. R. 16 Eq. 1, 10, 11.

⁵ The following decisions seem to involve the proposition that such appointments are not too remote. *Langston v. Blackmore*, Amb. 289.

§ 530. As at common law the personal property of a married woman passes to her husband, his joining in a deed of settlement of such property without her seems to have been sufficient.¹ Of course this will be otherwise under the modern Married Women's Acts.² In *Daniel v. Arkwright*,³ under a power in a marriage settlement to appoint to children, an appointment was made to trustees on the trusts of a contemporaneous marriage settlement of a daughter executed by her. It was held that the appointment was good. In the same case there was an appointment by a deed poll in favor of another daughter, who was already married, for life, and after her death to her husband and children. This appointment was held bad, but on evidence that the appointor's intention failed, by the mistake of his solicitor, to be carried out, the deed was rectified so as to appoint to the daughter absolutely.⁴

§ 530 *a.* In *Birley v. Birley*⁵ (1858) A., who had power to appoint to one or more of his children, ten in number, made an appointment to two of them. The next year the appointees settled the property appointed to them upon trusts for the children and grandchildren of A., by a deed which recited that at the time of the appointment it was understood between A. and the appointees that they should consider themselves as possessed of the property appointed upon the said trusts. Lord Romilly, M. R., held that the appointment was void as in fraud of the power. He said, speaking of "*Routledge*

Routledge v. Dorril, 2 Ves. Jr. 357. *Gosset's Settlement*, 19 Beav. 529, 537. See *White v. St. Barbe*, 1 V. & B. 399; *Trollope v. Routledge*, 1 De G. & Sm. 662; *Wright v. Goff*, 22 Beav. 207; *Thompson v. Simpson*, 1 Dr. & W. 459, 487; *Irwin v. Irwin*, 10 Ir. Ch. 29; *Conolly v. M'Dermott*, Beat. 601 (see Sugd. Law Prop. 513-515); 1 Jarm. Wills (5th ed.) 259, note; Sugd. Pow. (8th ed.) 670, 671; Tud. L. C. in Real Prop. (4th ed.) 569;

2 L. C. in Eq. (7th ed.) 318; 3 Dav. Conv. (3d ed.) 145, note.

¹ See *Fitzroy v. Richmond*, 27 Beav. 190.

² Cf. *Wombwell v. Hanrott*, 14 Beav. 143.

³ 2 H. & M. 95.

⁴ The limits of this apparent exception to the rules governing the exercise of powers is well stated in *Morgan v. Gronow*, L. R. 16 Eq. 1, 10, 11.

⁵ 25 Beav. 299.

v. *Dorril* and that class, they simply lay down the proposition, that when the donee of a power intends to appoint and the appointee intends to settle the property, the whole may be effected by one deed or one instrument, and the appointment and settlement may be made simultaneously; but if the reason of the appointment being made to the appointee arises from a previous contract with the donee of the power to appoint to persons not objects of the power, I find no previous case which amounts to a decision that such an appointment can be supported in this court.”¹

§ 530 *b*. In *Pryor v. Pryor*² a like decision was made on similar facts. Lord Justice Turner, however, distinguished the case of an appointment to a daughter on marriage and a contemporaneous settlement by her on herself, her husband, and children, and thought this was not a fraud on the power.³ In *Turner's Estate*⁴ Fry, L. J., said: “It appears to us to be further plain that the mere existence of an antecedent contract between the donee of the power and the appointee for a resettlement conferring benefits on a stranger is not enough to invalidate the appointment. . . . But if the court find not only that there was an antecedent contract, but that the contract was the *causa sine qua non* of the appointment, . . . then the case is different, and the appointment is bad.”⁵

§ 530 *c*. The cases in the last two sections raised the question of an alleged fraud on the power. That question is not raised in considering remote limitations under appointments. Suppose A., having a power of appointment by deed among his issue, joins with his daughter (who was unborn at the creation of the power) in her marriage settlement, by which the property is limited to the daughter for life, and on his death to those of her issue who survive her. There is no question here of fraud on the power; all the limitations are within its

¹ See *Salmon v. Gibbs*, 3 De G. & Sm. 343; 2 L. C. in Eq. (7th ed.) 315 *et seq.*

² 2 De G. J. & S. 205.

³ Cf. *In re Turner's Estate*, 28 Ch. D. 205, 213, 214.

⁴ Id. 216, 217.

⁵ See *In re Crawshaw*, 43 Ch. D. 615.

terms; the only question is whether the limitations are too remote. We have seen ¹ that they are not too remote, that the marriage settlement is analyzed into an appointment by the donee, and a settlement by the appointee. Suppose, then, further that the donee of the power and his daughter covenant together that such a marriage settlement shall be made, so that the covenant raises an equitable estate, such equitable estate, it is presumed, would not be too remote.

§ 530 *d.* Now to go a step farther. Let A. have a power to appoint among his issue by deed. By his own marriage settlement let A. covenant with the trustees of the settlement that he will appoint the property to the eldest daughter that may be born to him with remainder to her children, and afterwards by the daughter's marriage settlement, in which the daughter joins, let such an appointment be made. Here the equitable estate raised to the unborn children of an unborn daughter by the covenant is void for remoteness. The appointment to the unborn children of the daughter, contained in A.'s marriage settlement, being, therefore, void, A. still has the control over the power, and the marriage settlement of the daughter would seem to be good.²

4. *Consequences of an Appointment being too remote.*

§ 531. (1) If an appointment which is not too remote is followed by an appointment which is too remote, if, for instance, under a power given by will to appoint among issue, an appointment is made to a grandchild of the testator unborn at the testator's death, for life, and on its death to its children, although the latter appointment is too remote, the appointment to the grandchild is good.³

§ 532. (2) The validity of limitations to take effect after

¹ § 528, *ante*.

² Cf. *Cooke v. Cooke*, 38 Ch. D. 202; *Whitby v. Mitchell*, 42 Ch. D. 494; 44 Ch. D. 85.

³ *Routledge v. Dorril*, 2 Ves. Jr. 357. *Graham v. Whitridge*, 99 Md.

248. See *Wollaston v. King*, L. R. 8 Eq. 165; *Morgan v. Gronow*, L. R. 16 Eq. 1; *D'Abbadie v. Bizoin*, Ir. R. 5 Eq. 205; *Sugd. Pow.* (8th ed.) 503; *Lewis*, *Perp.* 496; *Marsden*, *Perp.* 258.

prior limitations which are too remote has been before discussed.¹ Appointments should be governed by the same rules.²

§ 533. (3) When an appointment of personal property fails as being too remote, the property passes under a residuary appointment.³ Under the Wills Act,⁴ which provides that void devises shall fall into a residuary devise, it was held by Jessel, M. R., in *Freme v. Clement*,⁵ that on an appointment of real estate, bad for remoteness, the estate passed under a residuary appointment. The learned judge seemed to assume that had it not been for the Wills Act the land would not have passed under the residuary appointment, but would have gone as limited in default of appointment. And this appears to be correct. The provision of the Wills Act has been largely adopted in America.⁶

§ 534. When there is no residuary appointment, property appointed too remotely, whether real or personal, goes as in default of appointment.⁷

§ 535. So when the power itself is bad, limitations in default of appointment, being vested, take effect as if the power had been omitted.⁸

§ 536. (4) The connection of the doctrine of *cy pres* in the exercise of powers with the Rule against Perpetuities is discussed later.⁹

¹ §§ 251–258, *ante*.

² See also Lewis, Perp. 496, 497; Marsden, Perp. 258.

³ Wollaston v. King, L. R. 8 Eq. 165. See *In re Abbott*, [1893] 1 Ch. 54, 59.

⁴ 1 Vict. c. 26, § 25.

⁵ 18 Ch. D. 499.

⁶ See § 248, *ante*.

⁷ Webb v. Sadler, L. R. 14 Eq. 533. Graham v. Whitridge, 99 Md. 248. Sugd. Pow. (8th ed.) 639. Marsden, Perp. 259. If there is a good appointment in fee, or absolutely, and an appointment

over in the nature of an executory devise which is too remote, the appointee of the fee or absolute interest will, it is presumed, continue to hold it. § 247, *ante*; but see §§ 783 *et seq.*, *post*.

⁸ Marlborough v. Godolphin, 1 Eden, 404; *sub nom.* Spencer v. Marlborough, 3 Bro. P. C. (Toml. ed.) 232. *In re Abbott*, [1893] 1 Ch. 54. See Carr v. Atkinson, L. R. 14 Eq. 397; Marsden, Perp. 259, 260; §§ 112, 258, *ante*.

⁹ §§ 643 *et seq.*, *post*.

§ 537. (5) The rules concerning gifts to classes are the same whether the gifts are direct or by way of appointment. Therefore an appointment to a class of persons some of whom cannot take because they do not come within the limits of the Rule against Perpetuities is bad altogether. *Gee v. Audley*.¹ *Routledge v. Dorril*.² But, also, as in case of a direct gift, an appointment to a person within the limits of perpetuity is not rendered bad by being accompanied by an appointment to persons who are not within those limits, provided the amount of the gift to the former is not affected by the existence or non-existence of the latter.³

§ 538. In the first edition of Jarman on Wills⁴ it was said: "Where a power does in terms authorize an appointment to issue only who are born within due limits, an appointment to a more extensive range of issue would be good *pro tanto*, though made to the whole as a class; for, as the issue who are beyond the line are also strangers to the power, the instrument would be simply nugatory *quoad* the shares of the remote appointees." Mr. Lewis⁵ favors this view, although he points out the difficulties attending it. But these difficulties seem, in truth, to be insuperable. How much are the objects of the power to take? 1. The whole fund? But this is not what the appointor intended, and is not in accordance with the anal-

¹ Cited in *Routledge v. Dorril*, 2 Ves. Jr. 357, 365; *sub nom.* *Jee v. Audley*, 1 Cox, 324. According to the statement in Cox's report, the limitation in *Jee v. Audley* was direct, and not by way of appointment under a power.

² 2 Ves. Jr. 357. *Lewis, Perp.* 493-496. *Sugd. Pow.* (8th ed.) 505, 506. *Marsden, Perp.* 254, 255. See *Harvey v. Stracey*, 1 Drew. 73, 126, 127; §§ 369 *et seq.*

³ *Griffith v. Pownall*, 13 Sim. 393. *Wilkinson v. Duncan*, 30 Beav. 111. *Von Brockdorff v. Malcolm*, 30 Ch. D. 172. *In re*

Thompson, [1906] 2 Ch. 199. See § 523 *c, ante*. *In re Coulman*, 30 Ch. D. 186, § 523 *f, ante*. *Bell v. Bell*, 13 Ir. Ch. 517. *In re Hallinan's Trusts*, [1904] 1 I. R. 452. *White v. Commissioner for Stamps*, 8 N. S. Wales State Rep. 287. *In re Hobson's Will*, [1907] Vict. L. R. 724, 736. *Lewis, Perp.* 494, 495. *Sugd. Pow.* (8th ed.) 506. *Marsden, Perp.* 255, 256; §§ 389-395, *ante*. The case of *Reed v. McIlvain*, 113 Md. 140, §§ 245 *g et seq., ante, contra*, seems incorrect.

⁴ P. 250.

⁵ *Perp.* 498 *et seq.*

ogy of what happens when the appointment is to persons not objects of the power but ascertained by name. In such a case the objects of the power take the shares given to them, and the shares given to persons who are not objects go in default of appointment.¹ 2. Shall they take only their shares? But to determine their shares it will be necessary to wait until it is determined how many of the appointees come into existence. This, however, may not be determined until too remote a period. It seems, therefore, clear, although Mr. Lewis hesitates to reach the conclusion,² that when there is a power to appoint to those of a certain class who come into existence within the limits of the Rule against Perpetuities, and an appointment is made to the whole class, the entire gift is void, for it is impossible until a period which may be too remote to determine the shares of the true objects of the power.³ And accordingly the editors of Jarman have reversed his original statement.⁴

§ 539. Suppose the power is to appoint only among those of a class who come within the due limits, and the appointment is to the whole class, some of whom may come without the limits, and after this appointment, but before the interest created by it takes effect, the class is certainly reduced to those who are the proper objects of the power, is the appointment thereby rendered good? For instance, suppose A. has a power to appoint among those of his issue who are born in his lifetime, and he appoints by will to all his grandchildren when the youngest reaches twenty-one. At A.'s death he has children living, but before his youngest grandchild reaches twenty-one all his children die, and none of his grandchildren are in fact born after his death. Mr. Lewis⁵ seems to think this would be a good appointment; but this cannot be so. It is to

¹ *Sadler v. Pratt*, 5 Sim. 632. *Harvey v. Stracey*, 1 Drew. 73. *Sugd. Pow.* (8th ed.) 507.

² And see *Marsden, Perp.* 254.

³ See *Church v. Kemble*, 5 Sim. 525, where this seems to have been conceded to be the law; and also

Harvey v. Stracey, 1 Drew. 73, 130-137; and *Sugd. Pow.* (8th ed.) 507.

⁴ 1 *Jarm. Wills* (3d ed.) 272; (4th ed.) 290; (5th ed.) 260; (6th ed.) 318.

⁵ *Perp.* 500.

a class whose number at the time of the appointment is uncertain, and may not be ascertained within the prescribed limits.

§ 540. In *Stroud v. Norman*¹ A. had a power to appoint personalty among those of her issue born in her lifetime, the appointment to take effect not more than twenty-one years after her death. She appointed to her daughter B., on condition that if B., when requested by A. or her executors, should not execute a certain release, the property should go to the sons of A., their executors, administrators, and assigns. Within two years after the death of A. her executors requested B. to make the release. It was held by Wood, V. C., that if B. did not make the release the gift to the sons would take effect. Here there was a power to make an appointment to take effect within a certain time, and the appointment was in fact made to take effect on a contingency which might occur after the time. Putting the question of remoteness aside, if the contingency should happen within the required time, the gift to the sons would be good; if it should not happen within that time, it would be bad, because not authorized by the power. The validity of the appointment, apart from the Rule against Perpetuities, must be determined within the limits fixed by that Rule; only an appointment which came within those limits would be valid; and hence the appointment did not conflict with the Rule. As Lord St. Leonards said of *Stroud v. Norman*, "It should seem that no question upon a perpetuity could arise in the case."²

§ 540 a. By a series of English cases the following doctrine has been established. When, under a general power, property is appointed on trusts which do not take effect, either because the share of a *cestui que trust* has lapsed, or because no trusts are declared, or because they do not exhaust the fund, property unappointed goes as part of the donee's property to his residuary legatees or next of kin, and does not pass under the gift in default of appointment. And the doctrine has been

¹ Kay, 313.

² Sugd. Pow. (8th ed.) 527, note (e). Marsden, Perp. 254.

extended to cases where the donee has shown an intention to make the property under the power a part of his estate, as by putting it into a mass with his own property.¹ In none of the cases has the appointment failed for remoteness, but it would seem that the doctrine is applicable to such cases.²

5. *Election.*

§ 541. Before discussing the effect of the doctrine of election on remote appointments, it will be found convenient, and indeed necessary, to consider another class of cases, where the question of election has been raised in connection with appointments in excess of powers. It is settled law that when property is appointed by will to persons who are not objects of the power, and the testator gives objects of the power legacies from his own property, the latter take the legacies only on an implied condition that they allow the appointments to stand.³ "If under a power to appoint to children the donee of the power appoints to grandchildren, which is bad, and the children who are entitled to claim by reason of the badness of the appointment also take under the will other property, the grandchildren are entitled to put them to an election."⁴ "But to this Rule," it has been said, "so far as regards appointments, a notable exception is taken, viz. that when there is an appointment to an object of the power, with directions that the same shall be settled, or upon any trust, or subject to any condition, then the appointment is held to be a valid appointment, and the superadded direction, trust, or condition

¹ See Farwell, Pow. (2d ed.) 237-245; 1 Jarm. Wills (6th ed.) 819; Theobald, Wills (7th ed.) 243-245; Lewin, Trusts (12th ed.) 175, and cases cited in them.

² There do not appear to be any cases in America where the general doctrine has been passed upon. This interesting question was sug-

gested to the author by his learned friend, Charles Lowell Barlow, Esq., of the Boston Bar.

³ *Whistler v. Webster*, 2 Ves. Jr. 367. Sugd. Pow. (8th ed.) 578 *et seq.*

⁴ *Per James, V. C.*, in *Wollaston v. King*, L. R. 8 Eq. 165, 173, 174.

is void, and not only void, but inoperative to raise any case of election.”¹ This alleged exception must be examined.

§ 542. The series of cases out of which it has grown is as follows: *Carver v. Bowles*² (1831). A testator, having power by his marriage settlement to appoint by will a trust fund to such one or more of his children, “at such time or times, in such shares, proportions, manner and form, and with, under and subject to such powers, provisos, conditions, restrictions and limitations over (such limitations over to be for the benefit of some one or more of such children or his, her or their issue)” as he should choose, by will did “appoint, give and bequeath” the fund to his five children equally to be divided between them; and he declared, “so far as I lawfully or equitably may or can,” that the shares of the daughters should be held for themselves for life, without power of anticipation,³ and on their death to their issue. The testator devised property of his own to his children. It was held that the daughters took absolute interests, the grandchildren not being objects of the power.⁴ The question of election having been raised, Sir John Leach, M. R., is reported to have “held that the testator having made an absolute appointment in the first instance, no case of election was raised.” This is the whole opinion. This decision seems no exception to the general rule; the testator, knowing that there might be a doubt whether the appointment was good, yet devised his own property, without showing any intention of letting the operation of the devise depend upon the validity of the appointment. It does not appear that he thought he had the power to appoint, neither does it appear that he meant to appoint although he had not the power; and one of these is necessary to raise a case of election.⁵

¹ *Wollaston v. King*, L. R. 8 Eq. 174.

² 2 Russ. & M. 301.

³ See § 433, *ante*.

⁴ P. 307. This was a mistake; the grandchildren were within the power under the clause authorizing

limitations over to the issue of the children. The real objection to the gift to the grandchildren was that it was too remote, see § 425, *ante*; but this was apparently not noticed.

⁵ Sugd. Pow. (8th ed.) 581, 582. Cf. *Blacket v. Lamb*, 14 Beav. 482,

§ 543. *Church v. Kemble*¹ (1832). Under a power given to A. to appoint to children or issue born before the appointment, A. appointed to her children, and, in case she had power so to do, she directed a daughter's share to be in trust for her life, and on her death for the daughter's children generally. Her own property she gave to her children. It was admitted that this appointment to the daughter's children was bad,² and Shadwell, V. C., said:³ "If the testatrix had an absolute, unconditional intention to give what she could not, then a case of election would arise;" but he held "that she only meant to appoint the property in a given manner, provided she had the power so to do,"⁴ and that therefore there was no election.⁵

§ 544. *Kampf v. Jones*⁶ (1837). Under a power to appoint to issue, A. appointed to his child, and directed that the property should be retained by trustees, and the income paid to the child for life, with limitations over on its death to its issue. These latter limitations were too remote. Held, that the child took absolutely.⁷ The residue of the testator's personalty was given to the children, but "the general assets of the testatrix were insufficient to pay her debts and the other legacies given by her will,"⁸ so that no question of election could arise. This circumstance seems to have been sometimes overlooked.

§ 545. *Blacket v. Lamb*⁹ (1851). Under a power to appoint to children, A. appointed to his children, and added: "I especially request each of my six children will not sink into or spend their respective shares thereof, but leave them for the benefit of their respective children; and if any of them has no children, then to leave the same, so that their shares may go in the same way as my general estate and effects are hereby limited," which was to the children for life, with remainders

488-490, § 545, *post*; *Stephens v. Gadsden*, 20 Beav. 463, § 547, *post*; *King v. King*, 15 Ir. Ch. 479, § 550, *post*.

¹ 5 Sim. 525.

² See §§ 423, 425, *ante*.

³ 5 Sim. 525, 529.

⁴ P. 530.

⁵ Sugd. Pow. (8th ed.) 578.

⁶ 2 Keen, 756.

⁷ See § 426, *ante*.

⁸ See 2 Keen, 759.

⁹ 14 Beav. 482.

over. Held, that the children were not put to their election. Here again it appeared that the testator neither thought he could appoint, nor meant to appoint although he could not, but that he knew he could not appoint, and therefore did not appoint, but only requested his appointees to do what he knew he could not do himself, and what he himself did not try to do.¹

§ 546. *Moriarty v. Martin* ² (1852). Under a power to appoint to children, A. by will appointed a fund of money to his son, and requested him to invest it in land or mortgage to the use of himself for life, remainder to his children. A. also bequeathed property of his own to the son. Blackburne, C., held that a case of election was raised in favor of the son's children. The Lord Chancellor evidently disapproved of *Blacket v. Lamb*. The decision in this case, however, seems questionable. It would appear as if the testator knew he could not appoint to his grandchildren, and therefore did not mean to appoint to them, and so that there was no case for election.³

§ 547. *Stephens v. Gadsden* ⁴ (1855). Under a power in a marriage settlement to appoint to issue, a testator appointed to his children, subject to certain trusts, which were to them for life, and on their deaths over to their children. He gave his own estate on the same trusts. Sir John Romilly, M. R., held that the case was governed by *Carver v. Bowles* and his own decision in *Blacket v. Lamb*, and that the children took free from the trusts. It is not expressly stated that the children were not put to their election, but as the opinion says nothing about it they probably were not. Here certainly is a case where the testator appointed, and meant to appoint, an equitable interest to persons who could not take it, because the gift to them was too remote.

§ 548. *Woolridge v. Woolridge* ⁵ (1859). Under a power in

¹ See Sugd. Pow. (8th ed.) 581, 582; *Stephens v. Gadsden*, 20 Beav. 463, § 547, *post*; *Moriarty v. Martin*, 3 Ir. Ch. 26, § 546, *post*; *Tomkyns v. Blane*, 28 Beav. 422, § 549,

post; *King v. King*, 15 Ir. Ch. 479, § 550, *post*.

² 3 Ir. Ch. 26.

³ See Sugd. Pow. (8th ed.) 582.

⁴ 20 Beav. 463.

⁵ Johns. 63.

a marriage settlement to appoint to children, a testatrix appointed to her children, and by codicil directed that the share of a daughter should be enjoyed by her for life, and on her death go to the daughter's children. The children of the testatrix took an interest in her own property. Wood, V. C., ruled that the daughter took an absolute interest in the appointed property, and that no case of election was raised. He said that the principle of *Carver v. Bowles*¹ appeared to have been that "Where there is an absolute appointment by will in favor of a proper object of the power, and that appointment is followed by attempts to modify the interest so appointed in a manner which the law will not allow, the Court reads the will as if all the passages in which such attempts are made were swept out of it, for all intents and purposes; i. e. not only so far as they attempt to regulate the quantum of interest to be enjoyed by the appointee in the settled property, but also so far as they might otherwise have been relied upon as raising a case of election."²

§ 549. *Tomkyns v. Blane*³ (1860). A marriage settlement gave a power to A. to appoint to his issue, with a gift, in default of appointment, to A.'s children. A. by will appointed to his children, to vest in them with the same limitations over for the benefit of them or their children, and upon such conditions and in such manner in all respects as was declared concerning his residuary estate. Among the gifts of the residuary estate were some to persons not objects of the power. Sir John Romilly, M. R., held that a case of election was raised. He distinguished the case from *Carver v. Bowles* and *Blackett v. Lamb*, on the ground that in those cases there was a separate distinct appointment to the children and a subsequent modification, while in *Tomkyns v. Blane* there were direct appointments in favor of persons not objects of the power, and the interests appointed to those persons went in default of appoint-

¹ § 542, *ante*.

³ 28 Beav. 422.

² Johns. 69. See *King v. King*,

§ 550, *post*.

ment, and it was the one taking in default of appointment who was put to his election.

§ 550. *King v. King*¹ (1864). Under a power to appoint to children, A. by will appointed to his children, and directed that their shares should be settled on them for life, and on their death to their children. A. also gave the children legacies, and directed that they should be settled on the same trusts. The will contained a proviso that if the shares appointed and legacies were not so settled, they should be forfeited. Brady, L. C., held that by the clause of forfeiture the children were put to their election, although had it not been for that clause he would have agreed with *Blacket v. Lamb* and *Woolridge v. Woolridge*.

§ 551. *Churchill v. Churchill*² (1867). Under a power to appoint to children, A. by will appointed to his daughters, and directed that the share of each daughter should be held in trust for her for life, and on her death to go to her children. A.'s children took interests in the residue of his estate. Sir John Romilly, M. R., following *Woolridge v. Woolridge* and the other cases, held that there was no case for election.

§ 552. *White v. White*³ (1882). A.'s marriage settlement gave him a power to appoint to the issue of the marriage, with a gift, in default of appointment, to the children of the marriage. A. appointed to a child of the marriage, subject to a charge in favor of persons not objects of the power. And A. devised property of his own to such child subject to the same charges. Fry, J., held that the child took only the fund less the charges, that the amount of the charges went in default of appointment, and that the child taking in default of appointment was put to his election. He distinguished *Carver v. Bowles* and *Woolridge v. Woolridge* on the ground that in those cases the testator had directed "that certain property which he had in the first place appointed absolutely to an object of the power, should be held upon trusts or subject to conditions in favor of persons who

¹ 15 Ir. Ch. 479.

³ 22 Ch. D. 555.

² L. R. 5 Eq. 44.

were not objects of the power, but who would probably be objects of any settlement or provision which might be made by the appointee;" whereas in the case before him the charge was not "such a disposition of the gift to" the child "as according to the ordinary course of family arrangements in this country he would be likely to make."¹

§ 552 *a*. *King v. King*² (1884). A. having a testamentary power to appoint land to his issue, by will appointed it to his son charged with £2,000, and directed that the £2,000, together with certain other portions of his estate, should form a fund for the payment of debts and legacies. *Chatterton, V. C.*, held that the son only took the fund less the £2,000, that the £2,000 went in default of appointment, and that those taking in default of appointment were put to their election.

§ 552 *b*. The difference between *Carver v. Bowles*, *Church v. Kemble*, *Kampf v. Jones*, *Blacket v. Lamb*, *Moriarty v. Martin*, *Stephens v. Gadsden*, *Woolridge v. Woolridge*, *King v. King* (15 Ir. Ch. 479), and *Churchill v. Churchill*, on the one hand, and *Tomkyns v. Blane*, *White v. White*, and *King v. King* (13 L. R. Ir. 531), on the other, is that in the former, the effect of rejecting the modifications which were outside of the power, as too remote, was not to let in those persons entitled in default of appointment, but to give the original appointees the entire interest, while in the latter, the good appointments did not cover the whole interest, and the portion not properly appointed went in default. In the former cases, the question was whether the appointees should be put to their election, and (except in *Moriarty v. Martin*) it was held that they were not; and in the latter the question was whether those taking in default of appointment should be put to their election, and it was held that they were.³

§ 553. The foregoing series of cases, especially *Woolridge v. Woolridge* and *Churchill v. Churchill*,⁴ although none of them

¹ See also *Wallinger v. Wallinger*, L. R. 9 Eq. 301.

² 13 L. R. Ir. 531.

³ See *Farwell, Pow.* (2d ed.) 377, 378.

⁴ §§ 548, 551, *ante*.

have been decided in the Court of Appeal,¹ may very probably have settled the law for England to be that if an appointment to A., the object of a power, is followed by a direction that the appointed property shall be settled on A. for life, with a limitation over to A.'s issue, who are not objects of the power, A. takes the absolute interest, and no case of election is raised.

§ 554. But certainly where this doctrine has not been settled it ought not to be received without careful consideration.

§ 555. It may be said that when the direction to settle upon persons not objects of a power can be separated from the appointment to an object of the power, the former should be disregarded, and the latter stand, *ut res magis valeat quam pereat*; and that as the modification would be disregarded when necessary to effect this purpose, it should be disregarded for every other. But this last does not seem a necessary consequence. It may be well to disregard the modification if it cannot be sustained as a whole, and if to sustain it in part would less effectuate the testator's intention than to disregard it altogether; but if by reason of the doctrine of election the modification can be sustained, there seems no good reason why it should not be. And such appears to have been the opinion of Lord St. Leonards.²

§ 556. We now come to the question of election as bearing upon an appointment which is bad, not because the appointee is outside of the power, but because the appointment is too remote. The question arose in *Carver v. Bowles*, although it was not noticed,³ and it was probably decided in *Stephens v. Gadsden*;⁴ and in several of the cases the appointments in excess of the power would have been too remote had they been within the power; but *Wollaston v. King*⁵ is the chief English authority upon the point.

¹ See, however, *Roach v. Wood*,
3 Ch. D. 429, 444.

² Sugd. Pow. (8th ed.) 581, 582.

³ See § 542, note, *ante*.

⁴ § 547, *ante*.

⁵ L. R. 8 Eq. 165. See *In re Abbott*, [1893] 1 Ch. 54, 59. Cf. §§ 526 *et seq.*, *ante*.

§ 557. In *Wollaston v. King*, A., under a power in her marriage settlement to appoint to children, appointed part of the fund to her son for life, remainder as he should by will appoint, and, after other appointments, appointed the residue of the fund to her daughters, to whom she also gave interests in her own property. James, V. C., held that the appointment to the son's appointees being void, the daughters took under the residuary gift, and that there was no case for an election.

§ 558. The Vice-Chancellor having stated the rule as to election, and what he calls the "notable exception," above discussed,¹ and having mentioned that this exception was not followed in the case of *Moriarty v. Martin*,² which is said to have received the approval of Lord St. Leonards, adds: "Notwithstanding that case and that approval, I feel bound by the current of the English authorities." He goes on to say that he has endeavored to extract from the English cases on which this exception has been based a principle which he can apply to the case before him, and truly remarks that the rule laid down in *Whistler v. Webster*³ (and which has been so often quoted with approval as the ground of the doctrine of election), "that no man shall claim any benefit under a will without conforming, so far as he is able, and giving effect to everything contained in it whereby any disposition is made showing an intention that such a thing shall take place," was not applied in the cases forming that exception; and he concludes that the only intelligible principle which can be deduced from those cases is that "the rule as to election is to be applied as between a gift under a will and a claim *dehors* the will, and adverse to it, and is not to be applied as between one clause in a will and another clause in the same will;" and that on this principle there is no ground for election in the case before him.

§ 558 a. But although such a claim may be said to be under

¹ His language is cited § 541, *ante*.

² 3 Ir. Ch. 26; § 546, *ante*.

³ 2 Ves. Jr. 367.

another clause of the same will, yet the appointee really claims under the instrument creating the power. Suppose A. having a power to appoint by will among his children, appoints by will to his children, directs that the share of each shall be settled on it for life with remainder to its issue, and gives his own property to his children. Here the modification is rejected and the children take absolute interests in the appointed property, and the reason why they take absolute interests is that they take what is really a gift from the creator of the power, and the direction in the will for the settlement of the property fails, because the terms of the gift do not allow it.

§ 559. But further, though it may be true that the only principle deducible from *Woolridge v. Woolridge* and the like cases is the one drawn by the learned Vice-Chancellor, and that the application of it to the case before him required the decision which he made, yet in a jurisdiction where the courts are not bound by the authority of those cases, the fact that they go upon this principle is rather a reason for not following them. For while the rule laid down in *Whistler v. Webster* is founded on a very broad and intelligible equity, this supposed principle is highly technical and arbitrary. It is a principle which does not seem to have occurred to the judges who decided the earlier cases, but which has been subsequently invented as a ground for supporting them.

§ 560. Two additional reasons are given by the learned Vice-Chancellor for reaching his conclusion. *First*. The son was insolvent, and had his exercise of the power been good, the fund appointed would, on the familiar principle of *Townshend v. Windham*,¹ have gone to his creditors. Suppose now that in this case the son's appointees were entitled to be compensated out of A.'s other property, could the creditors have stepped into their place? The complication of this question, and the difficulty of deciding it, seemed to the learned Vice-Chancellor a reason for not raising an election at all.

¹ 2 Ves. Sr. 1.

The question is a nice one, but it is submitted that the creditors would be entitled. The son's appointees would, by virtue of the appointment, be entitled to compensation out of A.'s property, and all property going to any person by virtue of the son's general appointment could be taken for the son's debts.

§ 561. *Second.* "It is material that the reason why the gift fails is that there was an attempt to create a power in violation of the rules of law. I apprehend that it is not for this Court to aid such an attempt, either by the application of the doctrine of election or otherwise." This seems more specious than sound. The law does not refuse to allow remote estates any more stringently than it refuses to allow one man to give away another man's property. Yet it is in aid of attempts to give away other people's property that the doctrine of election has its usual application. In this class of cases the application of the doctrine of election makes the testator say to the appointee, "If you will settle this appointed property on A., as you lawfully may, I will give you a legacy, but if you will not, then I will give the legacy, as I lawfully may, to A.;" and in this there seems nothing illegal and nothing to which the law should refuse its aid.¹

§ 561 *a.* In *Wollaston v. King* the question was whether appointees under a will were put to their election. It was held that they were not, because they claimed under the will, not *dehors* the will. This reason may not be worth much as one on which to ground an exception to the general doctrine of election, but it was all that the learned Vice-Chancellor could find; even this ground, however, fails to support two late decisions, one in England, another in Ireland.

§ 561 *b.* In *re Warren's Trusts*.² Here A., under a power in her marriage settlement to appoint personal property to issue, appointed to a son for life, and on his death to those of his children who should reach twenty-one. This appointment to the son's children was too remote. The Court held that the persons who took in default of appointment, and had also lega-

¹ Cf. §§ 528, 529, *ante*.

² 26 Ch. D. 208.

cies given to them by A. out of her own property were not put to their election. Yet those persons took not under but *dehors* the will. Pearson, J., said:¹ "How can there be any question of election? I must read the will as if the invalid appointment were not in it at all. The ordinary case of election is when a testator attempts to give by his will property which belongs to some one else. Such a gift is not *ex facie* void. In the present case it is the law which disappoints the appointee. The gift is void *ex facie*." When A.'s property is bequeathed by a testator to B., and B. is "disappointed" in getting it, it is the law that "disappoints" him in refusing him the right to take another man's property, just as much as the law "disappoints" him in refusing to let him take a remote interest.²

§ 561 *c. In re Handcock's Trusts*.³ In this case A. under a power in his marriage settlement to appoint personal property to issue, appointed by his will to his children and the survivor of them for their lives and life, and on the death of the survivor to divide the principal among all such of his grandsons as should reach twenty-one and all his granddaughters who should reach that age or marry. The appointment to the grandchildren was bad for remoteness. The Court of Appeal in Ireland (reversing the decree of Chatterton, V. C.) held that the persons who took on default of appointment, and had also legacies given to them by A. out of his own property, were not put to their election.

§ 561 *d.* It is submitted that *In re Warren's Trusts* and *In re Handcock's Trusts* cannot be supported, even if the exception recognized in *Wollaston v. King* is to be maintained. In *Albert v. Albert*,⁴ under a power given to A. to appoint

¹ Id. 219.

² See § 561, *ante*. The appointment is not bad *ex facie* of the will. "The invalidity of the appointment to grandchildren does not appear on the will itself; you must look to another instrument to discover it. The benefit attempted to be given to grandchildren by the will is remote only because it has

to be dealt with as if inserted in the settlement. It would be quite good as a dealing with a testator's own property." Price, *arguendo* in *In re Handcock's Trusts*, 23 L. R. Ir. 34, 44.

³ 23 L. R. Ir. 34.

⁴ 68 Md. 352; and see *Graham v. Whitridge*, 99 Md. 248. The decision in this last case that the

by will to his "heirs" (which the court construed to mean "children") either in trust or absolutely, an appointment to grandchildren was held bad for remoteness, and the property went in default of appointment. The persons taking in default of appointment, who also had legacies under A.'s will out of his own property, were put to their election. The Maryland decision seems preferable to those of the English and Irish Courts.

§ 561 *e.* And by a late English case not only have the opinions in *In re Warren's Trusts*, and *In re Handcock's Trusts*, but also the *dictum* of Pearson, J. (cited § 561, *ante*), been disapproved. In *Bradshaw v. Bradshaw*¹ Kekewich, J., held that when an appointment failed because too remote, those who took in default of appointment were put to their election.²

doctrine of election is not to be applied when the testatrix has appointed the property over which she has a power by one clause of her will, and devised her own property by another clause of the same will, follows *Wollaston v. King*, as to which see §§ 557 *et seq.*, *ante*.

¹ [1902] 1 Ch. 436.

² The opinion of the learned judge puts the matter so well, that a considerable extract from it is here given. "If the doctrine of election applies, it compels them to make good out of what they take the interests which are defeated by their insisting, as they do, upon the appointment being void for remoteness. I do not myself see what the difference in principle is between an appointment becoming void for that reason, and an appointment such as is mentioned by Kay, J., referring to *Whistler v. Webster*, 2 Ves. Jr. 367, 2 R. R. 260, to persons who are not objects of the power. Whether the appointment fails because it

offends against some rule of law, or whether it fails because it offends against the rule of construction of the will, which is that the donee may appoint to certain persons and no others, seems to me, with all deference to those who entertain a contrary opinion, not to matter one jot. In either case it fails, and on its failing the property goes to those who take in default of appointment. But it has seemed otherwise to other judges, and I have to determine whether I can properly follow those other judges. If I had a direct expression of opinion by a judge, or still more by the Court of Appeal, I should be bound to follow it and leave it to some higher tribunal to set me right. But I am by no means sure that there is any such expression. The point is noticed by James, V. C., whose *dictum* on a question of equity is, I need not say, entitled to the highest respect, in *Wollaston v. King*, L. R. 8 Eq. 165. But certainly this is no more

§ 561 f. But, in *In re Oliver's Settlement*¹ Farwell, J., disapproved of *Bradshaw v. Bradshaw*. He said that "the whole

than a dictum. The question he had to decide, which did not at all raise the question which is to be decided in this case, is accurately stated in the third paragraph of the headnote: '*Held*, also, that the rule as to election was applicable only as between a gift under a will and a claim *dehors* the will and adverse to it, and not as between one clause in a will and another clause in the same will, and that therefore the daughters were not put to their election.' That was the point he had to decide. But there was likewise an appointment void for remoteness, and it was held that the appointed property went over to the persons claiming in default of appointment, and James, V. C., said, L. R. 8 Eq. 175, 'It is also material that the reason why the gift fails is that there was an attempt to create a power in violation of the rules of law;' and then he adds: 'I apprehend that it is not for this court to aid such an attempt, either by the application of the doctrine of election or otherwise.' That is not a decision. It is an observation made in reference to a point which was not before the Vice-Chancellor, and I do not think I can regard it as binding. The only other case in which the point has been dealt with is *In re Warren's Trusts*, 26 Ch. D. 208. There Pearson, J., really had not the point directly before him in the general discussion of the case. When he came to the end, there was apparently a point raised by Mr. Everitt,

who referred to *Wollaston v. King*, L. R. 8 Eq. 165, and Pearson, J., said this, 26 Ch. D. 219: 'How can there be any question of election? I must read the will as if the invalid appointment were not in it at all. The ordinary case of election is when a testator attempts to give by his will property which belongs to some one else. Such a gift is not *ex facie* void. In the present case it is the law which disappoints the appointee. The gift is void *ex facie*.' He says that election does not apply to this case because he has not got in the will that which raises it, and he says he has not got that because the gift being *ex facie* void he is bound to read the will as if it were not there. With great respect to the learned judge, I cannot help thinking there is a slip in his conclusion. You cannot say, as it seems to me, that the gift is not in the will. The gift is in the will, and is void, and because it is void the case of election arises; and if I am right in saying that there is no substantial distinction between an appointment to a person not an object of the power and an appointment to a person who cannot take because of the law against perpetuities, then the doctrine of election must be applied. There was a case in Ireland of *In re Handcock's Trusts*, 23 L. R. Ir. 34, which is entitled to the greatest respect, distinctly following what was supposed to have been held by Pearson, J., in *In re Warren's Trusts*, 26 Ch. D. 208, and by

¹ [1905] 1 Ch. 191.

foundation" of Kekewich, J.'s, judgment is "that it is immaterial whether the appointment fails for illegality or merely on a point of construction." Mr. Justice Kekewich, it must be admitted, laid himself open to this remark. He said that he saw no difference between an appointment void for remoteness and an appointment to persons who are not objects of the power. "Whether the appointment fails because it offends against some rule of law, or whether it fails because it offends against the rule of construction of the will, which is that the donee may appoint to certain persons and no others." The expression was not fortunate. In truth, there is no question of construction. Take a common, perhaps the most common, case of election. A., having a power to appoint a fund to children, to whom, in default of appointment, the fund goes, appoints to grandchildren, and leaves legacies out of his own property to his children. There is no question of construction; there is no dispute as to what persons are objects of the power, nor that the appointees are not such persons. What the doctrine of election says to the children is, unless you will give your property, as you lawfully may, to the grandchildren, you shall not have your legacies. How does this differ from a case where it is said to the children, unless you settle your property upon the grandchildren, as you lawfully may, you shall not have your legacies? As is said, § 561, *ante*, "The law does not refuse to allow remote estates any more stringently than it refuses to allow one man to give away another man's property. Yet it is in attempts to give away other people's property that the doctrine of election has its usual application." *In re Oliver's Settlement* was followed by Warrington, J., in *In re Beales' Settlement*,¹ but, notwithstanding,

James, V. C., in *Wollaston v. King*, L. R. 8 Eq. 165, and yet it is my duty not to bind myself by an authority which is not binding, if I cannot reconcile it with what I conceive to be the doctrine of the Court. I think that, as in the case

of an appointment to a person not an object of the power, a case of election is raised, so in the case of an appointment such as this which is void for remoteness, a case of election is raised."

¹ [1905] 1 Ch. 256.

it is submitted to the learned reader that *Bradshaw v. Bradshaw* is the better law.

§ 561 *g.* *In re Oliver's Settlement* has now been followed by *In re Wright*,¹ and *In re Nash*,² affirmed by the Court of Appeal.³ These cases have probably settled the law in England. They add nothing to the reasoning of Farwell, J., in *In re Oliver's Settlement*; and in spite of an unfeigned respect for the opinion of that distinguished judge, the author is constrained to let the preceding sections stand as in the last edition, being still convinced that the decision in *Bradshaw v. Bradshaw* is correct.

¹ [1906] 2 Ch. 288.

³ [1910] 1 Ch. (C. A.) 1.

² [1909] 2 Ch. 450.

CHAPTER XVI.

MORTGAGES.

§ 562. *Rights at Law.* — When the condition of a mortgage must be fulfilled, if at all, within twenty-one years after lives in being, — and this is the case with the vast majority of mortgages, — no question of remoteness can arise as to the legal rights of the parties. The mortgagee has a fee simple subject to a condition, any rights under which must begin within the limits required by the Rule against Perpetuities.

§ 563. If the condition is such that the mortgagor's right of re-entry may not arise until a period beyond the limits of the Rule, then such right would seem to be too remote. But in practice, as a mortgagor never relies upon his legal right of re-entry to revest his estate, the matter is not very important. And, moreover, in the United States a right of entry on breach of a condition is generally, however erroneously on principle, considered as not being within the Rule against Perpetuities. See §§ 304 *et seq.*, *ante*.

§ 564. *Rights in Equity.* — When the condition of a mortgage must be fulfilled, if at all, within twenty-one years after lives in being, no question of remoteness can arise as to the equitable rights of the parties. The mortgagor is regarded in equity as the owner, and the mortgagee as having a lien which, on failure to fulfil the condition, is turned into a right to have the land applied in discharge of his debt. The failure to fulfil the condition in the mortgage is a condition precedent to the vesting of the right, but as the condition in the mortgage must, *ex hypothesi*, be fulfilled, if at all, within the limits of the Rule, the right is not too remote.¹

¹ *Sioux City Terminal R. R. Co. v. Trust Co. of N. America*, 82 Fed. Rep. 124.

§ 565. If there is a power in the mortgage deed authorizing the mortgagee to sell at any time after default, it may be said that as this power can be exercised at any time, it is exercisable at a period more than twenty-one years after lives in being, and is therefore void.¹ But to this it may fairly be said that such power is merely a remedy given to a party to enforce a right which the law would otherwise enforce for him; and if he has a present right and a present remedy, the fact that he may not choose at once to exercise his remedy, and that therefore a title may not be acquired by a sale under the power till a period beyond the limits of remoteness, no more invalidates the power than it would invalidate a title acquired by a sale under order of court in a foreclosure suit.²

§ 566. If the condition of the mortgage is such that a failure to fulfil it by the mortgagor may occur more than twenty-one years after lives in being, it will be found more difficult to sustain the rights of the mortgagee. Default by the mortgagor is a condition precedent to the right of the mortgagee to have the land applied in discharge of the debt; and if the default may not happen till a remote period, — for instance, if the condition of the mortgage is to pay \$5,000 in thirty years, — this condition would seem too remote, and the mortgagee's right invalid.

§ 567. Three answers to this difficulty may be suggested. (1) That the mortgagee can at any time assign or discharge the mortgage.³ But, as we have seen,⁴ the fact that an interest subject to a condition precedent is alienable does not save it from the operation of the Rule against Perpetuities.

§ 568. (2) That the mortgagor can pay off the debt at any time.⁵ But the short answer to this, as applied to the case we are considering, is that the mortgagor cannot insist upon paying off the mortgage debt before it is due.⁶

¹ § 475, *ante*.

² §§ 281, 303, *ante*.

³ See *Gilbertson v. Richards*, 5 H. & N. 453, 454, 459.

⁴ Chap. VII., *ante*.

⁵ *Lewis, Perp.* 560; 1 *Pow. Dev.* (Jarm. ed.) 250, 251, note.

⁶ Even if the mortgagor had the option to pay off the mortgage debt at any time, it is conceived the re-

§ 569. (3) That the question is only one of remedy. It may be called a question of remedy, but this seems only a piece of verbal jugglery to avoid reaching an unwelcome conclusion. The right in equity to the land does not pass from the mortgagor, the right of the mortgagee to have the land applied for his benefit does not arise, until there is a default.

§ 570. Mortgages in fee for the payment of money or the performance of other acts at a date more than twenty-one years after lives in being have probably been few. The question may be some day presented in connection with railroad mortgages. In view of the large interests likely to be involved, and the novelty of the question, the courts may perhaps sustain the validity of such mortgages. It is to be hoped, should this be the case, that they will frankly declare them an exception to the Rule against Perpetuities, and not, by attempting to reconcile them with the Rule, bring confusion into the Rule itself.¹

sult would be the same. Suppose an estate was given to A. and his heirs, but unless within fifty years they should pay \$5,000 to a college, the land should go to B. and his heirs. No one would doubt that the gift to B. was too remote. Yet A. by paying the money at any time would destroy the gift. When the owner of the present estate can destroy a future interest at his pleasure, such future estate is not too remote; thus a remainder after an estate tail is never too remote; but if he can avoid it only by fulfilling an onerous condition, then it comes within the scope of the Rule against Perpetuities.

¹ But see an article by Mr. Charles Sweet, 18 Jurid. Rev. 132, 139. Cf. *London & S. W. R. Co. v. Gomm*, 20 Ch. D. 562, § 275, *ante*, which shakes badly *Gilbertson v. Richards*, 4 H. & N. 277; 5 H. &

N. 453; §§ 271-273, *ante*. See Sugd. Pow. (8th ed.) 16. The Supreme Court of California seems to have acted in this spirit in construing the statutes of that State, when passing upon the validity of a trust deed, the form which mortgages take in many of the States. In *Sacramento Bank v. Alcorn*, 121 Cal. 379, with reference to an appeal founded on the objection that a trust deed was void because it restrained alienation for a period not dependent upon the duration of life, the Court said: "The appeal is supported by very elaborate and forcible briefs, which, if the questions were open for consideration, would challenge and receive serious and careful examination, but we do not think the matter can now be considered open for discussion. Our own records will disclose the fact that trust deeds have been quite

§ 570 *a*. Further, the Courts in the United States have generally held that legal rights of entry for breach of condition are not within the Rule against Perpetuities,¹ and there seems no special reason why there should be any exception in case of conditions in mortgage deeds,² and it may be said that equity in this matter should follow the law. It is questionable how far this would be a proper application of that maxim. But the Courts having, however unadvisedly, taken the first step and held such conditions good at law, it would not perhaps be strange if they went on and took this second step also.

§ 571. Supposing such a mortgage should chance to be held bad, what would be the consequences? Where a mortgage passes a legal fee to the mortgagee, the court, before ordering a reconveyance, would compel the mortgagor to account for any consideration received. Where no legal title passes to the mortgagee, as is the case in several of the United States, it would seem that the mortgagee would be without security.³

§ 571 *a*. Pledges must be governed by the same rules as mortgages. Sinking funds are generally created and governed by Statute. When this is not the case, they seem to differ from mortgages, in that the mortgaged property belongs (in equity) to the mortgagor, for the mortgagee it is only security, while the sinking fund is generally the immediate property in equity of the creditor; and the allowance of a sinking fund raises perhaps a question as to a restraint on alienation, but not one which comes within the scope of the Rule against Perpetuities.

frequently used as security for loans. Their validity has been upheld in numerous cases, beginning very soon after the adoption of the code and continuing until the present time. These decisions, which have been uniform, establish a conclusion which has become a rule of property, and however thoroughly we might now be convinced that the rule is erroneous,

it should not be disturbed." See *Camp v. Land*, 122 Cal. 167; *Staacke v. Bell*, 125 Cal. 309; *Atlantic Trust Co. v. Woodbridge Canal Co.*, 86 Fed. Rep. 975.

¹ See §§ 304 *et seq.*, *ante*.

² See § 563, *ante*.

³ Such mortgages will often be found to have been authorized or confirmed by legislative action.

CHAPTER XVII.

CUSTOMARY RIGHTS.

§ 572. THERE is in England a class of legal rights which seem to be exempt from the operation of the Rule against Perpetuities, namely, easements acquired by custom.

§ 573. A right is acquired by custom when it belongs to the inhabitants of a particular town or other place,¹ and is to be distinguished from a right acquired by prescription, which is a right belonging to a particular person, or to the owner of a particular parcel of land.²

§ 574. When a man has a present right by prescription, all persons who may at any time enjoy the right will take under him, it is under his control, and being a present right it is not obnoxious to the Rule against Perpetuities. But when a man has a right by custom, since he has it only as an inhabitant, he loses it when he ceases to be an inhabitant; and no future possessor of the right holds under any former possessor, for he does not take as heir or assignee, but as inhabitant. The right of a future inhabitant is not in the control of any present inhabitant.³ It is really a new right arising for the first time to each owner when he becomes an inhabitant; it is subject, in other words, to the condition precedent of his becoming an inhabitant; and as this may not happen till a remote period, such a right seems to be in violation of the Rule against Perpetuities.⁴

¹ Sometimes when it belongs to persons following a particular calling. § 577, *post*.

² Co. Lit. 113 b. 2 Bl. Com. 263. Hall, Commons, 108-112.

³ See *Smith v. Gatewood*, Cro.

Jac. 152; *Jacobson v. Fountain*, 2 Johns. 170, 176.

⁴ Cf. what is said by Mr. Charles Sweet in his note to *Challis*, Real Prop. (3d ed.) 209, 210.

§ 575. Yet certain of these rights are held good in England. The question of perpetuity seems never to have been considered with regard to them. And, indeed, all of them in theory, and probably many of them in fact, go back to a time when the Rule against Perpetuities did not exist.

§ 576. Thus the inhabitants of a village may have a right of way, e. g. to church or to market.¹ So to dance on a green.² So to have games or horse-races on certain land.³ So to take water.⁴

§ 577. Such customs have been held good even when not confined to the inhabitants of a particular locality, but extended to all of a certain occupation. Thus a custom for victuallers to erect booths on the land of A. during a fair has been held good.⁵ In like manner a custom for fishers to dry their nets on shore which is private property is good.⁶

¹ See 7 Edw. IV. 26; *Boteler v. Bristow*, 15 Edw. IV. 29; 18 Edw. IV. 3; 21 Edw. IV. 54; *Withers v. Iseham*, Dyer, 70 a, 71 a; *Goodday v. Michell*, Cro. El. 441; *Owen*, 71; *Baker v. Brereman*, Cro. Car. 418, 419; *Gateward's Case*, 6 Co. 59 b; *sub nom. Smith v. Gatewood*, Cro. Jac. 152; *Bell v. Wardell*, Willes, 202; *Poynton v. Wilson*, 2 Lutw. 1506; *Grimstead v. Marlowe*, 4 T.R. 717, 718; Co. Lit. 110 b.

² *Abbot v. Weekly*, 1 Lev. 176. *Hall v. Nottingham*, 1 Ex. D. 1. *Williams*, Commons, 149.

³ *Fitch v. Rawling*, 2 H. Bl. 393. *Mounsey v. Ismay*, 1 H. & C. 729; 3 H. & C. 486. See *Millechamp v. Hudson*, Willes, 205, note.

⁴ *Race v. Ward*, 4 E. & B. 702. See *Boteler v. Bristow*, 15 Edw. IV. 29; *Goodday v. Michell*, Cro. El. 441; *Owen*, 71; *Pain v. Patrick*, 3 Mod. 289, 294; *Weekly v. Wildman*, 1 Ld. Raym. 405, 407; *Fitch v. Rawling*, 2 H. Bl. 393, 395.

⁵ *Tyson v. Smith*, 6 A. & E. 745; 9 A. & E. 406.

⁶ See 8 Edw. IV. 18, 19; *Boteler v. Bristow*, 15 Edw. IV. 29; *Baker v. Brereman*, Cro. Car. 418; *Pain v. Patrick*, 3 Mod. 289, 294; *Mayor of Linn Regis v. Taylor*, 3 Lev. 160; *Fitch v. Rawling*, 2 H. Bl. 393, 398; *Blundell v. Catterall*, 5 B. & Ald. 268, 295–298; *Tyson v. Smith*, 9 A. & E. 406, 411, 412; *Hale*, De Port. (Harg. Law Tracts), 86; *Hall*, Sea Shore, 176, note; *Coulson & Forbes*, Waters (3d ed.) 391.

This has been said to be a common-law right. Case of Tanistry, Davis, 32 b. Callis, Sewers, 73. But the contrary is now settled. See 8 Edw. IV. 18, 19 (discussed in *Blundell v. Catterall*, 5 B. & Ald. 268, 295, 298, and in *Tyson v. Smith*, 9 A. & E. 406, 411, 412; translated Hall, Commons, 159 *et seq.*); *Baker v. Brereman*, Cro. Car. 418; *Anon.*, Sav. 11; *Gray v. Bond*, 2 Brod. & B. 667; 5 J. B. Moore,

§ 578. And there are other cases which illustrate this class of customary rights.¹

§ 579. But although the Rule against Perpetuities was not applied to customary rights of this sort, the inconvenience which might arise from these unreleasable rights hampering land was felt; and it was early decided that such rights could arise by custom only when they were in the nature of easements, and that no *profits a prendre*, such as commons, could have their origin in custom. The authorities to this point are many.²

§ 580. In *Tyson v. Smith*³ there is a suggestion that if compensation be paid for such a *profit a prendre* it may be good; but the right in that case seems to have been an ease-

527; *Blundell v. Catterall*, *ubi sup.*; *Duncan v. Sylvester*, 24 Me. 482; *Locke v. Motley*, 2 Gray, 265; *Cortelyou v. Van Brundt*, 2 Johns. 357; *Brink v. Richtmyer*, 14 Johns. 255; *Whitaker v. Burhans*, 62 Barb. 237 (see 65 N. Y. 559); *Shrunk v. Schuylkill Nav. Co.*, 14 S. & R. 71, 81; *Hoyle v. M'Cunn*, 21 Dunlop, Ct. of Sess. 96; *Woolrych, Waters* (2d ed.) 163, 164; *Hall, Sea Shore*, 176, note; *Coulson & Forbes, Waters* (3d ed.) 391; *Gould, Waters*, § 100.

¹ *Fowler v. Dale*, Cro. El. 362. *Shelton v. Montague*, Hob. 118. *Bond's Case*, March, 16. *King v. Ecclesfield*, 1 B. & Ald. 348, 360. *Sowerby v. Coleman*, L. R. 2 Ex. 96. *Forbes v. Eccl. Commissioners*, L. R. 15 Eq. 51. *Dyce v. Hay*, 1 Macq. 305, 311.

² The following are the principal. *Boteler v. Bristow*, 15 Edw. IV. 29; *Id.* 32 (see 7 Ap. Cas. 659, 660; *Hall, Commons*, 159-162). *Gateward's Case*, 6 Co. 59 b; *sub nom. Smith v. Gatewood*, Cro. Jac. 152; 3 Leon. 202 (see 7 Ap. Cas.

660). *Fowler v. Dale*, Cro. El. 362. *Weekly v. Wildman*, 1 Ld. Raym. 405. *Bean v. Bloom*, 2 W. Bl. 926; *sub nom. Beau v. Bloom*, 3 Wils. 456 (which is not *contra*). *Selby v. Robinson*, 2 T. R. 758. *Grimstead v. Marlowe*, 4 T. R. 717. *Blewett v. Tregonning*, 3 A. & E. 554; 5 N. & M. 234. *Lloyd v. Jones*, 6 C. B. 81. *Race v. Ward*, 4 E. & B. 702. *Bland v. Lipscombe*, *Id.* 713, note. *A. G. v. Mathias*, 4 K. & J. 579. *Constable v. Nicholson*, 14 C. B. n. s. 230. *Knight v. King*, 20 L. T. R. 494. *Chilton v. London*, 7 Ch. D. 735. *Rivers v. Adams*, 3 Ex. D. 361. See *Mayor of Saltash v. Goodman*, 5 C. P. D. 431; 7 Q. B. D. 106; 7 Ap. Cas. 633, *et passim*; §§ 582, 583, *post*; *Chesterfield v. Harris*, [1908] 1 Ch. 230; [1908] 2 Ch. (C. A.) 397; *sub nom. Harris v. Chesterfield*, [1911] A. C. 623, § 583, note, *post*; 1 Wms. Saund. 340 c, note 3; *Hall, Commons*, 159-212; *Williams, Commons*, 194-197, 278-280.

³ 9 A. & E. 406, 425.

ment, and nothing of a like effect appears anywhere else. In *Mayor of Linn Regis v. Taylor*¹ a custom for the owners of ships in a certain town to take ballast was held good.² But in the light of later cases this can hardly be supported.

§ 581. It has sometimes been attempted to support a *profit a prendre* for inhabitants on the ground of a grant from the Crown. In *Willingale v. Maitland*³ the bill alleged that a *profit a prendre* had been granted by Queen Elizabeth to the inhabitants of a certain parish. The defendant demurred to the bill, thus admitting the actual grant. Lord Romilly, M. R., held, in accordance with some old authorities, that a grant from the Crown to the inhabitants of any place, *ipso facto*, incorporated them. In *Chilton v. London*⁴ Sir George Jessel, M. R., held that a bill to enforce such an alleged right, if it could be brought at all, must be brought by, or at least on behalf of, all the inhabitants. And in *Rivers v. Adams*⁵ it was held that no presumption of a grant by the Crown to inhabitants would be made to support an immemorial custom. *Rivers v. Adams* has been approved in *Mayor of Saltash v. Goodman*.⁶

§ 582. In *Mayor of Saltash v. Goodman*⁷ the plaintiffs claimed a several oyster fishery, and sued the defendants for disturbing it. The defendants justified under an alleged custom for all free inhabitants of ancient tenements in the borough of Saltash to take oysters at certain times. It was admitted by the plaintiffs that the custom had existed from time immemorial; and by the defendants it was admitted, and by all the judges declared, that the custom could not be good as a *profit in alieno solo*. In the Common Pleas Division Grove and Denman, JJ., held that the custom was bad. In

¹ 3 Lev. 160.

² Hall, Commons, 240, 241; and see *Padwick v. Knight*, 7 Ex. 854.

³ L. R. 3 Eq. 103.

⁴ 7 Ch. D. 735.

⁵ 3 Ex. D. 361.

⁶ By Grove, J., 5 C. P. D. 445-

448; by Denman, J., Id. 454; by Lord Selborne, C., 7 Ap. Cas. 637; by Lord Blackburn, Id. 662; and by Lord Watson, Id. 664.

⁷ 5 C. P. D. 431; 7 Q. B. D. 106; *sub nom.* *Goodman v. Mayor of Saltash*, 7 Ap. Cas. 633.

the Court of Appeal Baggallay, L. J., held that the plaintiffs did not have a several oyster fishery; but Brett and Cotton, L. JJ., agreed with the Court below that the custom could not be supported. The case was then carried to the House of Lords, and was there twice argued. Lord Blackburn held that the judgment of the courts below should be affirmed, but Lord Selborne, C., and Lords Cairns, Watson, Bramwell, and Fitzgerald thought it should be reversed.¹

§ 583. The ground on which the House of Lords supported the custom was this: If the custom could have had a lawful origin, such origin must be presumed; and such lawful origin would have been a grant to the borough, with a condition in favor of the free inhabitants. This so-called condition seems to have been considered by the law lords to have given an equitable interest. Lords Selborne, Cairns, and Watson distinctly supported the custom as a charitable trust.² And it seems clear that it is only as a charitable trust, if at all, that such a right can be supported. If the Crown, in a branch of the sea where every one can fish (or where no one can fish, — it matters not which), grants a several fishery to a borough, with a condition that the inhabitants of a certain place can fish also at a time certain, it is just as much a grant to those inhabitants as it is to the borough, and therefore, in accordance with *Rivers v. Adams*,³ cannot be assumed as the basis for an immemorial custom.⁴

¹ It is to be observed that of the ten judges who passed upon the validity of the defence (Baggallay, L. J., alone holding that the plaintiffs had not made out their title), five, Grove, Denman, Brett, Cotton, and Lord Blackburn, were of opinion against the defendants, as many as were of opinion for them; and that of these last, one, Lord Watson, was a Scotch judge, who owned he did not know much about the matter.

² See §§ 682, 685, note *post*. See also *In re Christchurch In-*

closure Act, 35 Ch. D. 355, 369 *et seq.*; 38 Ch. D. 520, 530; *In re St. Stephen*, 39 Ch. D. 492, 500, 501; *In re Norwich Town Close Estate Charity*, 40 Ch. D. 298, 301, 306. Cf. *Green v. Putnam*, 8 Cush. 21; *Higginson v. Turner*, 171 Mass. 586, 591; *Challis, Real Prop.* (3d ed.) 195.

³ § 581, *ante*.

⁴ See *Chesterfield v. Harris*, [1908] 1 Ch. 230; [1908] 2 Ch. (C. A.) 397; *sub nom.* *Harris v. Chesterfield*, [1911] A. C. 623. Freeholders in parishes adjoining a

§ 584. In America the decisions that no *profit a prendre* can be created by custom have been often and uniformly followed.¹

§ 585. A more doubtful and difficult question is to determine whether in America easements can be created by custom in inhabitants. It has been shown² that they can be so created in England. In New Hampshire it has been held³ that easements in inhabitants can be created by custom; and in several of the cases where it has been held that *profits a prendre* cannot be created by custom, it is said that easements can be.⁴ In New Jersey and Virginia it has been held that no right can arise from custom, for no custom in America can have existed from time immemorial.⁵

§ 586. As a practical matter, the doctrine held in New Jersey and Virginia seems preferable to that adopted in New Hampshire. The objection which exists to allowing *profits a prendre* by custom really applies, though in a less degree, to allowing easements by custom. In England the latter have

non-tidal river had been in the habit of fishing openly, as of right, and commercially, for centuries. Riparian proprietors claiming to be owners of the bed of the river brought an action of trespass against the freeholders. The Court of Appeal gave judgment for the plaintiffs, and the House of Lords (by 4 to 3) affirmed the judgment. The judges of the Court of Appeal distinguished *Mayor of Saltash v. Goodman*, on the ground that that was the case of a trust.

¹ *Littlefield v. Maxwell*, 31 Me. 134. *Hill v. Lord*, 48 Me. 83. *Perley v. Langley*, 7 N. H. 233. *Nudd v. Hobbs*, 17 N. H. 524. *Waters v. Lilley*, 4 Pick. 145, 148. *Knowles v. Nichols*, cited in *Kenyon v. Nichols*, 1 R. I. 106, 110, 111. *Smith v. Floyd*, 18 Barb. 522. *Cobb v. Davenport*, 3 Vroom, 369, 389.

See *Ackerman v. Shelp*, 3 Halst. 125.

² §§ 575-578, *ante*.

³ *Nudd v. Hobbs*, 17 N. H. 524. *Knowles v. Dow*, 22 N. H. 387.

⁴ E. g. *Littlefield v. Maxwell*, 31 Me. 134; *Hill v. Lord*, 48 Me. 83; *Perley v. Langley*, 7 N. H. 233; *Smith v. Floyd*, 18 Barb. 522. See also *Coolidge v. Learned*, 8 Pick. 504; *Kent v. Waite*, 10 Pick. 138, 142.

⁵ *Ackerman v. Shelp*, 3 Halst. 125 (see *Allen v. Stevens*, 5 Dutch. 509, 513). *Ocean Beach Ass. v. Brinley*, 34 N. J. Eq. 438. *Albright v. Cartwright*, 64 N. J. L. 330, 332, 333. *Harris v. Carson*, 7 Leigh, 632. *Delaplane v. Crenshaw*, 15 Grat. 457. So said also by a lower court in Pennsylvania, *Young v. Collins*, 2 Brown, (Pa.) 292.

been recognized by the law, probably owing to the great antiquity of many of them, and to the fact that they have not been found burdensome. But in a country like most parts of America, where a population, sparsely scattered at first, has rapidly increased in density, such rights might become very oppressive. The clog that they would put on the use and transfer of land would far outweigh any advantage that could be acquired from them. Especially it should be remembered that they cannot be released, for no inhabitant, or body of inhabitants, is entitled to speak for future inhabitants. Such rights form perpetuities of the most objectionable character.

§ 586 *a*. Easements are often said to be acquired by prescription in the United States, but in truth they are acquired by adverse use. When a way, for instance, has been used for twenty years under a claim of right, the courts, following the analogy of the Statutes of Limitations, consider that an easement of way is created. The distinction between prescription and adverse user is shown in the case of a duty to pay money; such a duty could be raised by prescription, but cannot be by adverse user. In *Whittenton Manuf. Co. v. Staples*¹ it was held, by four judges against three, that a duty to pay one-fifth of the cost of repairing a dam might be imposed as a burden by prescription upon a mill which drew its water from the reservoir at the dam. If the doctrine held in New Jersey and Virginia that rights cannot be created by prescription in the United States be correct, then the decision in *Whittenton Manuf. Co. v. Staples* is wrong. It is respectfully submitted that that doctrine is correct and that the decision was wrong.² Even if an obligation to fence can be raised by prescription³ the law

¹ 164 Mass. 319.

² But see *Rust v. Lord*, 6 Mass. 90, 97; *Coolidge v. Learned*, 8 Pick. 503; 2 Dane, Ab. 640. Cf. *Dev-ereux v. Elkins*, 5 Dane, Ab. 568; *Spear v. Bicknell*, 5 Mass. 125, 130, Rand's note; *Mitchell v. Starbuck*, 10 Mass. 5, 11, Rand's note; *Car-*

son v. Blazer, 2 Binn. 475; 3 Dane, Ab. 253.

³ *Binney v. Hull*, 5 Pick. 503. See *Bronson v. Coffin*, 108 Mass. 175, 188; *Adams v. Van Alstyne*, 25 N. Y. 232, 235. Cf. *Castner v. Riegel*, 54 N. J. L. 498.

applicable to such an anomalous and "spurious" easement ought not, it is submitted, to be extended.¹

§ 587. Cases where all the world has rights over a man's land, of which the most striking instance is that of a highway, might be considered as exceptions to the Rule against Perpetuities. But this would be incorrect. Although the Sovereign does not strictly have an easement in the highway (notwithstanding the expression, the King's highway), yet it has a present, absolute control, and must be considered as representing the rights of all persons, future as well as present.²

§ 588. Easements may be attached to land by local custom; of course to such rights the present remarks do not apply. Whoever owns the land owns the easements. They do not differ, as to remoteness, from easements created by prescription or by grant.³

¹ See the dissenting opinion in *Whittenton Manuf. Co. v. Staples*, 164 Mass. 319, 334.

² As to what rights the public can gain by prescription or adverse uses, see *State v. Wilson*, 42 Me. 9; *Coolidge v. Learned*, 8 Pick. 504; *Pearsall v. Post*, 20 Wend. 111; 22

Wend. 425; *Curtis v. Keesler*, 14 Barb. 511; *Talbott v. Grace*, 30 Ind. 389.

³ *Carlyon v. Lovering*, 1 H. & N. 784. See *Gaved v. Martyn*, 19 C. B. N. S. 732; *Ivimey v. Stocker*, L. R. 1 Ch. 396. *Smirke*, Report of *Vice v. Thomas*.

CHAPTER XVIII.

CHARITABLE TRUSTS.

§ 589. IT is commonly said that gifts to charities are not subject to the Rule against Perpetuities. This may be to a certain extent correct, but the subject is involved in considerable confusion owing to the ambiguity of the terms employed.

§ 590. As has been shown,¹ the natural meaning of "a perpetuity" is "an inalienable indestructible interest." In this sense charitable trusts are perpetuities. And this is no arbitrary doctrine, but arises from the nature of such trusts. For while, generally, a trust is not good unless there be a natural or artificial *cestui que trust*, charitable trusts are an exception. They are recognized as valid, but yet they do not ordinarily have any definite *cestuis que trust*.² They are therefore inalienable, because there is no one to alienate them. No one has any alienable rights, because no one has any rights.³

¹ §§ 140 *et seq.*, *ante*. See also §§ 2, 3, 236, 268, *ante*; 1 Jarm. Wills (6th ed.) 367.

² The question whether a trust for definite persons can ever be considered a charity is discussed App. A, §§ 680 *et seq.*, *post*.

³ When it is said that property given on charitable trusts is inalienable, it is not meant that such property cannot be alienated by the paramount action of the sovereign, through the Legislature or the courts.

By the Legislature.—In England, the power of Parliament being unlimited in such matters, it can undoubtedly take property de-

voted to a charitable trust and apply it on other trusts, or give it to individuals; although this last, of course, would not at the present day be done. See *A. G. v. Buller*, Jac. 407, 412.

In the United States, under the provision of the Constitution (art. I. § 10), that no State shall pass any law impairing the obligation of contracts, as interpreted by the case of *Dartmouth College v. Woodward*, 4 Wheat. 518, charitable gifts cannot be destroyed. See *Tharp v. Fleming*, 1 Houst. 580. But the Legislature can authorize a sale for change of investment. *Stanley v. Colt*, 5 Wall. 119. *Pine St. Soc.*

§ 591. But the Rule against Perpetuities is not directed at preventing the alienation of present interests, but against the

v. Weld, 12 Gray, 570. See *Sohier v. Trinity Church*, 109 Mass. 1; *Ould v. Washington Hospital*, 95 U. S. 303, 312. *Contra*, *Tharp v. Fleming*, 1 Houst. 580.

By a Court of Equity. — Equity, of course, has no authority to destroy a charitable trust, but it can order a sale of the property and re-investment. This has been sometimes done in England. *A. G. v. Nethercoat*, 1 Hare, 400, note. *Parke's Charity*, 12 Sim. 329. *Re Overseers of Ecclesall*, 16 Beav. 297. *A. G. v. Archbishop of York*, 17 Beav. 495, 501. *Re Ashton Charity*, 22 Beav. 288. *Re Colston's Hospital*, 27 Beav. 16. *Re North Shields Old Meeting House*, 7 W. R. 541. And the power to do it has often been asserted. *A. G. v. Warren*, 2 Swanst. 291, 302, 303; 1 Wils. Ch. 387, 411, 412. *A. G. v. Newark*, 1 Hare, 395, 400, 402. *A. G. v. Kerr*, 2 Beav. 420, 428. *A. G. v. South Sea Co.*, 4 Beav. 453. *Tud. Char.* (3d ed.) 250–252. *Lewin, Trusts* (10th ed.) 614. The English Court of Chancery is, however, very cautious in exercising the power. *A. G. v. Buller*, Jac. 407. *A. G. v. Newark*, 1 Hare, 395, 412. *Re Suir Island School*, 3 J. & Lat. 171. *Re Lyford's Charity*, 16 Beav. 297, note. *Re Newton's Charity*, 12 Jur. 1011. *Re North Shields Old Meeting House*, 7 W. R. 541. See also *A. G. v. Cross*, 3 Mer. 524, 539; *A. G. v. Hungerford*, 8 Bligh, 437, 457 *et seq.*; 2 Cl. & F. 357, 374 *et seq.* (cf. *Sugd. Law of Prop.* 535); *A. G. v. Brettingham*, 3 Beav. 91;

Governor of St. Thomas Hospital v. Charing Cross R. Co., 1 J. & H. 400, 406; and cases collected in 14 Beav. 120, note.

In America, owing to the rapid changes in the country, the power has to be more frequently called into requisition. See *Stanley v. Colt*, 5 Wall. 119; *Ould v. Washington Hospital*, 95 U. S. 303; *Jones v. Habersham*, 107 U. S. 174, 183; *Odell v. Odell*, 10 Allen, 1, 6; *Asylum v. Lefebvre*, 69 N. H. 238; *Weeks v. Hobson*, 150 Mass. 377; *Amory v. A. G.*, 179 Mass. 89; *Brown v. Meeting St. Soc.*, 9 R. I. 177; *Brice v. All Saints Mem. Chapel*, 31 R. I. 183; *Shotwell v. Mott*, 2 Sandf. Ch. 46, 55; *Re Mercer Home*, *Fisher's Appeal*, 162 Pa. 232; *Lackland v. Walker*, 151 Mo. 210; *Franklin v. Armfield*, 2 Sneed, 305; 2 Perry, *Trusts* (6th ed.) § 764. For cases under statutes, see *Wells v. Heath*, 10 Gray, 17, 27; *Dutch Church v. Mott*, 7 Paige, 77, 84; *Burton's Appeal*, 57 Pa. 213. The only case on either side of the Atlantic in which the power is denied to Courts of Equity is *Tharp v. Fleming*, 1 Houst. 580.

An indefinite power of sale for change of investment given to trustees is good, if and because the power is destructible by *cestuis que trust* having a vested equitable interest within the limit of the Rule against Perpetuities, see §§ 467 *et seq.*, *ante*. In a charitable trust there are no *cestuis que trust*, and it might be suggested that such a power would be too remote (cf. *Foulke, Treatise*, § 421); but it

creation of remote future interests.¹ Now while it is true that the nature of charitable trusts makes them inalienable, and therefore perpetuities, in the natural sense of that term, it is by no means a necessary incident of charitable trusts that they should be allowed to begin in the remote future; or, in other words, that they should be exempt from the operation of the Rule against Perpetuities. The law may have exempted them, but such exemption is not involved in the conception of a charity.²

§ 592. The question of remoteness may present itself in connection with charitable trusts in three shapes: A gift to a charity may be followed by a remote gift to an individual; a gift to an individual may be followed by a remote gift to a charity; and a gift to a charity may be followed by a remote gift to another charity, — and in each of these cases there may or may not be a change of trustee. So that we have six typical forms: (1) To A. on a charitable trust, — on a remote contingency to B. for his own use. (2) To A. on a charitable trust, — on a remote contingency in trust for B. (3) To A. for his own use, — on a remote contingency to B. on a charitable trust. (4) To A. in trust for B., — on a remote contingency on a charitable trust. (5) To A. on a charitable trust, — on a remote contingency to B. on another charitable trust. (6) To A. on a charitable trust, — on a remote contingency on another charitable trust.

§ 593. In the first two cases, where the gift is from a charitable trust over to or for an individual, the gift over to the individual is subject to the Rule against Perpetuities. This has never been doubted.³

would probably be held that the authority to act for and represent the charity, which is possessed by the Legislature and the Courts in this matter, might be given to the trustee.

¹ As has been before remarked, the name which has become affixed to the Rule is unfortunate; if it

had been known as the Rule against Remoteness, its real character would have been indicated, and much confusion avoided.

² See *Philadelphia v. Girard*, 45 Pa. 9, 26; *Yard's Appeal*, 64 Pa. 95; *Challis, Real Prop.* (3d ed.) 195.

³ *In re Bowen*, [1893] 2 Ch.

§ 594. In the third case, where the gift is from an individual over to a corporation or person on a charitable trust, it is equally well settled that the Rule against Perpetuities applies.¹

§ 595. In the fourth case, where a trustee who holds property in trust for an individual is directed, on the happening of a remote contingency, to hold it on a charitable trust, it might be contended that no question of the application of the Rule against Perpetuities arises. That Rule concerns itself with the beginning, not with the end, of estates.² There is therefore no harm in the equitable estate of the individual ending at a remote period. There is no change in the legal estate, and the only matter which can be thought obnoxious to the Rule against Perpetuities is that the charitable trust begins at a remote period. But under the charitable trust no one has any rights, and as the purpose of the Rule against Perpetuities is to prevent the creation of remote rights, it might be argued that the Rule has no application.

§ 596. But the better opinion certainly seems to be that for the purpose of deciding questions of remoteness a charitable trust must be considered as an entity which can be subject to a condition precedent. This question came before Sir E. B. Sugden, when Lord Chancellor of Ireland; and it was conceded

491. *Merritt v. Bucknam*, 77 Me. 253. *Asylum v. Lefebvre*, 69 N. H. 238. *Brattle Sq. Church v. Grant*, 3 Gray, 142. *Wells v. Heath*, 10 Gray, 17. *Theological Education Soc. v. A. G.*, 135 Mass. 285. *Palmer v. Union Bank*, 17 R. I. 627. *Brice v. All Saints Mem. Chapel*, 31 R. I. 183. *Appeal of St. Luke's Church*, 1 Pa. S. C. (Walker) 283. *Starr v. Starr M. P. Church*, 112 Md. 171. *Re Baillie*, 7 N. S. Wales State Rep. 265. See *Odell v. Odell*, 10 Allen, 1, 7. Cf. *In re Tyrrell's Estate*, [1907], 1 I. R. 194, 292. But see § 603 *i, post*.

¹ *A. G. v. Gill*, 2 P. Wms. 369.

Johnson's Trusts, L. R. 2 Eq. 716. *Merritt v. Bucknam*, 77 Me. 253. *Merrill v. Amer. Baptist Missionary Union*, 73 N. H. 414. *Leonard v. Burr*, 18 N. Y. 96, 107, 108. *Smith v. Townsend*, 32 Pa. 434. See *In re Bowen*, [1893] 2 Ch. 491, 494; *Worthing Corporation v. Heather*, [1906] 2 Ch. 532. Cf. *Pewterers Co. v. Christ's Hospital*, 1 Vern. 161, which, however, was not a case of remoteness.

So a gift to a charity on a future contingency, without any preceding gift, is within the Rule against Perpetuities, §§ 604 *et seq.*, *post*.

² §§ 232 *et seq.*, *ante*.

by counsel and decided by him that such a change of trust on which land was held from individuals to a charity was within the Rule against Perpetuities.¹ Besides it will appear² that a charitable trust does sometimes vest a right in a definite person.

§ 597. The first four cases, therefore, form no exceptions to the Rule against Perpetuities. But in the last two cases, where the change is from one charity to another, it seems to be settled that there is an exception to the Rule.³ In *Christ's Hospital v. Grainger*⁴ it was distinctly ruled that a direction in a will that on a contingency, which might be in the indefinite future, a legacy, given to the town of Reading on a charitable trust, should be transferred to the city of London on another charitable trust, was good. The law of this case has been spoken of with approval in *Odell v. Odell*⁵ and *Jones v. Habersham*,⁶ and has been followed in *Storr's Agricultural School v. Whitney*⁷ and *MacKenzie v. Trustees of Presbytery of Jersey City*,⁸ and so are the text-books generally.⁹

§ 598. Although this case of *Christ's Hospital v. Grainger* is the only decision, except *Storr's Agricultural School v. Whitney* and *MacKenzie v. Trustees of Presbytery of Jersey City*, in which the gift of a legal interest to be held on a charitable trust coming after a prior gift of the legal interest to another trustee on another charitable trust has been held

¹ *Commissioners v. De Clifford*, 1 Dr. & W. 245, 254.

² App. A, §§ 680 *et seq.*, *post.*

³ Where there is no change of trustee it might indeed be urged, on the grounds stated above, that no question of remoteness arises, but the reason and decision given in the preceding section seem to forbid this. §§ 595, 596, *ante.*

⁴ 16 Sim. 83; 1 McN. & G. 460; 1 H. & Tw. 533.

⁵ 10 Allen, 1, 8, 9.

⁶ 107 U. S. 174, 185.

⁷ 54 Conn. 342. See also *Lenig's Estate*, 154 Pa. 209; *In re John's Will*, 30 Oreg. 494, 512; *Re Mountain*, 26 Ont. L. R. 163.

⁸ 67 N. J. Eq. 652, 669.

⁹ 1 Jarm. Wills (6th ed.) 367. Theob. Wills (7th ed.) 598. Tud. Char. (4th ed.) 54. Tud. L. C. in Real Prop. (4th ed.) 616. Marsden, Perp. 307. Tyssen, Char. Beq., 428. Challis, Real Prop. (3d ed.) 195. 4 Kent, Com. (12th ed.) 283, note 1. Cf. 33 Am. L. Reg. N. S. 63.

valid,¹ and although the case where there is no change of trustee might possibly be distinguished, yet the decision has stood so long unquestioned that it is likely to be followed.

§ 599. But in any jurisdiction where the matter is not closed by authority the correctness of the decision in *Christ's Hospital v. Grainger* deserves careful consideration. Lord Cottenham's argument was as follows: "It was then argued that it was void as contrary to the Rules against Perpetuities. These Rules are to prevent, in the cases to which they apply, property from being inalienable beyond certain periods. Is this effect produced, and are these Rules invaded by the transfer, in a certain event, of property from one charity to another? If the corporation of Reading might hold the property for certain charities in Reading, why may not the corporation of London hold it for the charity of Christ's Hospital in London? The property is neither more nor less alienable on that account." ²

§ 600. But here, with submission to so great an authority, is the common confusion between perpetuity in the sense of inalienability and perpetuity in the sense of remoteness. Property dedicated to a charity is inalienable necessarily; but to allow a gift to charity to commence in the remote future is not necessary; and the object of the Rule against Perpetuities is to restrain the creation of future conditional interests.³

§ 601. If a remote gift to a charity after a gift to another charity is good, because it is by nature inalienable, then a gift to a charity after a gift to an individual should be good; the individual can alienate the whole of his present interest, and the remote interest is no more and no less inalienable than when limited after a gift to another charity. Yet after a gift to an individual a gift to a charity may be unquestion-

¹ In the earlier case of *Society for the Propagation of the Gospel v. A. G.*, 3 Russ. 142, no question of perpetuity was raised, and the property seems to have been trans-

ferred to the plaintiffs, not as of right, but as the best scheme of carrying out the trust.

² 1 McN. & G. 464.

³ Chap. VII., *ante*.

ably bad for remoteness.¹ So a remote gift to a charity without any preceding gift at all is too remote.²

§ 603 *a*. The above paragraphs have been allowed to stand, for the most part, as in the first edition, but consideration since that time has suggested some doubt as to their entire correctness. The policy of the Law is that property should not be taken out of commerce. Now attempts have been made to take property out of commerce in two ways: *first*, by making the interest of present owners inalienable; *secondly*, by allowing interests to arise on future contingencies, beyond the control of the present holders. The courts have met the first attempt by establishing the doctrine that all restraints on the alienation of present or vested interests are void; they have met the second attempt by establishing the doctrine that future interests must arise within a certain time. These doctrines are distinct; a present owner cannot be restrained from alienation, even though the restraint be confined to lives in being,³ and an interest on a remote contingency is not rendered good by such interest being alienable;⁴ but the doctrines are both offshoots of the same principle, and when that principle wholly fails of application, it may be said that they both fail also; that in the case of charities, the law allows land and other property to be taken out of commerce; and that therefore there seems to be no occasion to apply the Rule against Perpetuities.

¹ §§ 594–596, *ante*; 603 *c*, *post*.

² See §§ 604 *et seq.*, *post*.

Suppose land is devised to A. upon charitable trusts, with an executory devise over on a remote contingency to B. upon other charitable trusts, and it has become desirable to sell the land and reinvest the proceeds, how can title be made? The approval of a Court of Equity will extinguish any claim by the Attorney General on behalf of the charities; but the legal title must be transferred. It may be said

that the Court may order the executory devisee to join in the conveyance; but suppose the executory devise over is to a person who will not be ascertained till the contingency happens, e. g. to one who shall then be president of a college. Here no title can be passed until the contingency occurs. 6 Harv. Law Rev. 195; 7 Harv. Law Rev. 406; 8 Harv. Law Rev. 211.

³ Gray, *Restraints on Alienation* (2d ed.) §§ 45 *et seq.*

⁴ Chap. VII., *ante*.

§ 603 *b*. Even where there is no change in the trustee or in the object of the trust, the application of the trust fund often depends upon a remote contingency. Thus if a fund be established for the support of poor widows, there must be poor widows needing support; if for a prize for the best essay on any subject, the essay must be written; if for the support of the professor of chemistry in a University, the chair of chemistry must be filled. So where the next of kin of the founder have a right to a scholarship at a College, the next of kin must be a candidate; and all of these may occur and will be occurring at remote periods.¹

§ 603 *c*. This contention leads, however, to very curious consequences. *In re Tyler*² was to this effect: T. bequeathed to the Trustees of the London Missionary Society £42,000, and committed to their keeping the keys of his family vault, "the same to be kept in good repair and name legible, and to rebuild when it shall require: failing to comply with this request, the money left to go to the Blue Coat School, Newgate Street, London." A suit was brought to obtain the opinion of the Court, whether the condition for keeping up the vault was valid and binding on the said Trustees. The Court of Appeal, affirming the decision of Stirling, J., held that the limitation over to the Blue Coat School was valid; that a provision that part of the fund should be applied to the repair of the vault would have been void, since such repair was not a charity; but that there was nothing illegal in repairing a vault; and that a gift over from one charity to another could be made upon this as upon any other contingency.³

§ 603 *d*. Suppose that land or a sum of money is given to College X. on condition that if on every first day of January in

¹ That provisions for the kin of a founder's charity are good, see *Dexter v. Harvard College*, 176 Mass. 192, and cases there cited.

² [1891] 3 Ch. 252.

³ See *Roche v. M'Dermott*,

[1901] 1 I. R. 394; *In re Barker*, 25 Times L. R. 753. Cf. an article by Mr. Charles Sweet, 18 Jurid. Rev. 132, 140, in which the correctness of *In re Tyler* is doubted.

every year the college does not pay a certain amount to those persons who shall then be the heirs of the donor, the land or fund shall go to College Y. This would seem, according to *In re Tyler*, to be a good limitation. It is obvious that a man may in this way make a perpetual provision for his family.

§ 603 *e*. Further if a remote limitation from one charity to another charity is good, it is hard to see why a remote limitation from a charity to an individual should be void. In the latter case the property is no more taken out of commerce than in the first case; on the contrary, when the gift over is to an individual there is a chance that the property will at some time come into commerce. Yet it has never been doubted that a limitation from a charity to an individual is within the Rule against Perpetuities.¹

§ 603 *f*. And this suggests that the wish to keep land or personal property in commerce is not the sole *raison d'être* of the Rule against Perpetuities. This reason certainly has no great force in the case of a trust where the trustees have full power to change investments, or to a case where there is a person in existence who can transfer or release a remote future interest, and yet in both these cases the rule is applied. Is it not another reason that when the ownership in property is in danger of being lost by a future contingency the property is not likely to be used with that energy and interest with which it would be used if it were a man's own? ²

§ 603 *g*. These considerations apply with full force to charities. Property is devised to a University to establish a Medical School. It will greatly diminish the motives to establish and conduct such a school, to found professorships and build laboratories, if all the money necessary to pay the professors and maintain the laboratories is to be taken from the University on a contingency, especially on a contingency over which it may have no control.

§ 603 *h*. Whether these considerations are sufficient to

¹ See §§ 593, 601, *ante*.

² See § 268, *ante*.

throw doubt on the correctness or wisdom of the decision in *Christ's Hospital v. Grainger* is submitted to the judgment of the learned reader.

§ 603 *i*. The law (whether wisely or not may be questioned) has allowed property to be given on terminable charitable trusts, to which the doctrine of *cy pres* cannot be applied. When such a trust has been created, there is a resulting trust to the grantor or to the testator's heirs or next of kin or residuary legatees upon the termination of the charitable trust. This resulting trust is a vested interest, and therefore is not obnoxious to the Rule against Perpetuities.¹ The difference between such a resulting trust and an executory gift divesting a charitable trust is well brought out by Stirling, J., in *Re Bowen*,² but it must be admitted that from an economic point of view they are much alike, and there is no ground of public policy which condemns one that does not condemn the other. It makes no difference upon the taking of property out of commerce whether a future interest is to the donor or to a third person. As an original question it would seem to have been well if determinable charitable trusts had been inhibited as well as determinable fees, and as when a man gives property to A. in fee, he must give it to him forever, so when he gives it in charity he ought to be obliged to give it forever. But the law seems settled otherwise.³

¹ *A. G. v. Pyle*, 1 Atk. 435. *Re Randell*, 38 Ch. D. 213. *Blunt's Trusts*, [1904] 2 Ch. 767. *Hopkins v. Grimshaw*, 165 U. S. 342. *Brooks v. Belfast*, 90 Me. 318. *Pond v. Douglass*, 106 Me. 85. *Easterbrooks v. Tillinghast*, 5 Gray, 17. *Stone v. Framingham*, 109 Mass. 303. *Daniel v. Jacoway*, Freem. Ch. (Miss.) 59. *Schlessinger v. Mallard*, 70 Cal. 326. *Jenkins v. Jenkins University*, 17 Wash. 160.

² [1893] 2 Ch. 491, 494, 496.

³ See § 312, *ante*.

See *Re Bowen*, [1893] 2 Ch. 491; *First Universalist Soc. v. Boland*, 155 Mass. 171; *Campbell v. City of Kansas*, 102 Mo. 326; *Re Baillie*, 7 N. S. Wales State Rep. 265; *Tyssen, Char. Beq.*, 429-431. See §§ 40-41 *a*, *ante*. The validity of the resulting trust is not affected by the fact that there is an express gift to those persons to whom the trust would result. *Re Randell*. *Blunt's Trusts*. *Stone v. Framingham*. *Jenkins v. Jenkins University*. See *Re Bowen*.

§ 604. There is another class of cases which must be considered. An executory gift to a charity after a gift to an individual may be bad for remoteness.¹ But suppose there be a gift to a corporation or association for a charitable object, not preceded by any gift to an individual, and that the corporation or association is not in existence, — is the gift good?

§ 605. If a gift is made to a charity on a contingent event and the happening of the event is a condition precedent to the gift, then, if the condition is too remote, or for any other reason illegal, the gift to the charity is void.²

§ 606. "If the gift in trust for charity is itself conditional upon a future and uncertain event, it is subject, in our judgment, to the same rules and principles as any other estate depending for its coming into existence upon a condition precedent. If the condition is never fulfilled, the estate never arises; if it is so remote and indefinite as to transgress the limits of time prescribed by the rules of law against perpetuities, the gift fails *ab initio*. We agree with what was said by the Master of the Rolls in *Cherry v. Mott*³ that 'there may no doubt be a conditional legacy to a charity as well as for any other purpose.'"⁴

§ 606 *a*. In the case *In re Stratheden*⁵ a testator bequeathed "an annuity of £100 to be provided to the Central London Rangers on the appointment of the next lieutenant colonel."

¹ §§ 594–596, *ante*.

² *Cherry v. Mott*, 1 Myl. & Cr. 123, 131, 132. See *A. G. v. Goulding*, 2 Bro. C. C. 428; *A. G. v. Bishop of Oxford*, cited 4 Ves. 431 *et seq.*; *A. G. v. Whitechurch*, 3 Ves. Jr. 141; *Corbyn v. French*, 4 Ves. 418; *De Themmines v. Bonneval*, 5 Russ. 289; *Clark v. Taylor*, 1 Drew. 642; *Re Gyde*, 79 L. T. R. 261, overruling s. c. 78 L. T. R. 449; *In re White's Trusts*, 33 Ch. D. 449; *In re Univ. of London Medical Sciences Inst. Fund v. A. G.*, [1909] 2 Ch. (C. A.) 1; *Brooks v. Belfast*, 90 Me.

318, 324; *Jocelyn v. Nott*, 44 Conn. 55; *A. G. v. Jolly*, 2 Strob. Eq. 379; *State v. Holmes*, 115 Mich. 456; *Girard Trust Co. v. Russell*, 179 Fed. Rep. 446; *Carbery v. Cox*, 3 Ir. Ch. 231; *Sims v. Quinlan*, 16 Ir. Ch. 191; 17 Ir. Ch. 43; *In the Will of Nilen*, [1908] Vict. L. R. 332; 1 Jarm. Wills (6th ed.) 367; *Tud. L. C. in Real Prop.* (4th ed.) 688.

³ 1 Myl. & Cr. 132.

⁴ *Per* Lord Selborne, C., in *Chamberlayne v. Brockett*, L. R. 8 Ch. 206, 211.

⁵ [1894] 3 Ch. 265.

Romer, J., held that this was a charitable bequest; but that it was void because conditioned on a contingency possibly too remote. In *Kingham v. Kingham*¹ a testator bequeathed to the Trustees of the General Assembly of the Presbyterian Church in Ireland, the sum of £2,000, for the erection or purchase of a building in Belfast to be designated the Kingham Mission Hall for Deaf and Dumb. If the trustees of the Bethel in Sandy Row, in Belfast, would sell it and hand over the proceeds to the Trustees of said Assembly, he further devised certain land to said Assembly Trustees to assist in paying a salary to a missionary to be appointed. Chatterton, V. C., held that this last devise was too remote.

§ 607. If the Court, however, can see an intention to make an unconditional gift to charity (and the Court is very keensighted to discover this intention), then the gift will be regarded as immediate, not subject to any condition precedent, and therefore not within the scope of the Rule against Perpetuities. The mode pointed out by the testator is only one way, though the preferable way, of carrying out the charitable purpose; and if it cannot, with regard to the general charitable intention, be carried out in that way, it will be carried out *cy pres*. Thus while the Court will allow the fund to be transferred to a corporation not in existence at the time of the gift, if such corporation is constituted in a reasonable time, it will not recognize the right of such non-existent corporation to keep the fund locked up until such time as it may please itself to be incorporated. The formation of the corporation is not a condition precedent to the charitable trust, and therefore the trust is not too remote. The cases where charitable gifts to non-existent corporations or societies have been sustained are numerous.²

[1897] 1 I. R. 170.

² *A. G. v. Bishop of Chester*, 1 Bro. C. C. 444. *A. G. v. Bowyer*, 3 Ves. Jr. 714, 727, 728. *Loscombe v. Wintringham*, 13 Beav. 87. *A. G. v. Craven*, 21 Beav. 392. *Mar-*

tin v. Margham, 14 Sim. 230. *Henshaw v. Atkinson*, 3 Mad. 396. *In re The Clergy Society*, 2 K. & J. 615. *In re Maguire*, L. R. 9 Eq. 632. *Sinnett v. Herbert*, L. R. 7 Ch. 232. *Chamberlayne v. Brockett*

§ 608. This mode of treating charitable gifts to bodies hereafter to be incorporated as present valid gifts depends upon

L. R. 8 Ch. 206, 211. *Re Gyde*, 79 L. T. R. 261, overruling s. c. 78 L. T. R. 449. *In re Davis*, [1902] 1 Ch. 876. *Wallis v. Sol. Gen. for New Zealand*, [1903] A. C. 173. *In re Swain*, [1905] 1 Ch. 669. *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99. *Ould v. Washington Hospital*, 1 McArth. 541; 95 U. S. 303, 313.* *Russell v. Allen*, 5 Dill. 235; 107 U. S. 163. *Jones v. Habersham*, 3 Woods, 443; 107 U. S. 174, 190, 191. *Field v. Drew*, 41 Fed. Rep. 371. *Brigham v. Brigham Hospital*, 126 Fed. Rep. 796; 134 Fed. Rep. 513. *Tincher v. Arnold*, 147 Fed. Rep. 665. *Swasey v. Am. Bible Soc.*, 57 Me. 523. *Dascomb v. Marston*, 80 Me. 223. *Odell v. Odell*, 10 Allen, 1, 7, 8. *Sherman v. Cong. Missionary Soc.*, 176 Mass. 349. *Codman v. Brigham*, 187 Mass. 309. *Grimke v. A. G.*, 206 Mass. 49. *Almy v. Jones*, 17 R. I. 265. *Cumming v. Reid Memorial Church*, 64 Ga. 105. *Trustees McIntire School v. Zanesville Canal Co.*, 9 Ohio, 203. *Williams v. First Presbyterian Soc.*, 1 Ohio St. 478, 500 *et seq.* *Andrews v. Andrews*, 110 Ill. 223. *Crerar v. Williams*, 145 Ill. 625. *Franklin v. Hastings*, 253 Ill. 46. *Re Taylor Orphan Asylum*, 36 Wis. 534. *Dodge v. Williams*, 46 Wis. 70. *Gould v. Taylor Orphan Asylum*, Id. 106. *Webster v. Morris*, 66 Wis. 366, 397. *Fadnesh v. Braunborg*, 73

Wis. 257. *Harrington v. Pier*, 105 Wis. 485.† *Schmidt v. Hess*, 60 Mo. 591. *Missouri Hist. Soc. v. Academy of Science*, 94 Mo. 459. *Clayton v. Hallett*, 30 Color. 231. *In re Podmore*, 6 Argus L. R. (Victoria) 7. See *In re Robinson*, [1892] 1 Ch. 95; *Wentworth v. Fernald*, 92 Me. 282; *Sanderson v. White*, 18 Pick. 328; *Franklin's Estate*, 9 Pa. C. C. 484; *Stevens's Estate*, 164 Pa. 209; *Doughten v. Vandever*, 5 Del. Ch. 51, 65; *Harper v. Central Trust Co.*, 11 Ohio Dec. 240; *Heuser v. Harris*, 42 Ill. 425, 434; *Ingraham v. Ingraham*, 169 Ill. 432; *Cromie v. Louisville Orphans' Home Soc.*, 3 Bush, 365, 375; *Peynado v. Peynado*, 82 Ky. 5; *Lilly v. Tobbein*, 103 Mo. 477; *Gidley v. Lovenberg*, 35 Tex. Civ. Ap. 203; *Estate of Winchester*, 133 Cal. 271; *Estate of Merchant*, 143 Cal. 537; *In re John's Will*, 30 Oreg. 494, 512; *In re Stewart's Estate*, 26 Wash. 32; *Moule v. Overton*, 16 N. Z. L. R. 106; *Tud. L. C. in Real Prop.* (4th ed.) 688, 689; 1 *Tiffany, Real Prop.* § 159; *Foulke, Treatise*, § 786. See also *Re Mountain*, 26 Ont. L. R. 163, with which cf. *A. G. v. Bishop of Chester*, *ubi sup.*

In *A. G. v. Downing*, Wilm. 1; *Dick*. 414; *Ambl.* 550, 571, there was a gift to a college to be established. The case was argued before Lord Northington, C., assisted by Sir Thomas Sewell, M. R., and

* In *Ould v. Washington Hospital* the case arose in the District of Columbia, where the law of Maryland is in force. As the doctrine of *cy pres* has probably never prevailed in Maryland, see § 611, *post*, the correctness of the decision may be ques-

tioned. But see *Russell v. Allen*, 107 U. S. 163, 171.

† Any *dicta* to the contrary in *Ruth v. Oberbrunner*, 40 Wis. 238; *Heias v. Murphey*, Id. 276, must be taken to have been overruled, as must also the case of *Will v. Fuller*, 75 Wis. 431. See 105 Wis. 510.

the doctrine of *cy pres*.¹ In some States, however, the power to administer a charitable trust *cy pres* is declared not to ex-

Lord Camden, C. J.; and again before Lord Camden, C., assisted by Sir Thomas Sewell and Wilmot, C. J. The gift was decreed to be good. The brief reports in Dickens and Ambler do not show that any objection of remoteness was raised; but Lord Chief Justice Wilmot in his Notes gives his opinion at length, and there discusses this objection. He says the gift is not too remote, because the King's license might be obtained in six months, which was "greatly within the time allowed by the law for the expecting executory trusts to arise," viz. "the compass of a life or lives." Wilm. 16, 17. This reasoning would not be held good at the present day. The Rule against Perpetuities was not then clearly settled. An event which by possibility *may* happen at a distant period is too remote. Such a gift would now be sustained on the ground stated in the text, that the incorporation of the college was not a condition precedent. But see *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 115, 144; *Literary Fund v. Dawson*, 1 Rob. (Va.) 402, 421; §§ 616-618, *post*.

¹ The power to carry out a charitable trust *cy pres* must not be confounded with the prerogative power of the Crown. Under the latter, when property has been given for an illegal purpose, or simply to charity, without the indication to any trustee or of any class of objects, the King, as *parens patriæ*, directs the application of the fund. See *In re Pyne*, [1903] 1 Ch. 83. The Court declares that

the property is to be applied to charitable uses, and reserves it "until his Majesty's pleasure be known in what manner it is his will the same shall be disposed of." *A. G. v. Herrick, Ambler*, 712. The application to the King for the order under his sign manual is properly made by the Attorney-General, and the latter is directed or recommended by the Court to make it. *Moggridge v. Thackwell*, 7 Ves. 36, 61. *Da Costa v. De Pas, Ambler*. 228. *Isaac v. Gompertz, Ambler*. 228, note. *Cary v. Abbot*, 7 Ves. 490, 497. 1 Seton, Decrees (3d ed.) 352. But apparently it may be applied for by any one, and granted on the approval of the Attorney-General. *A. G. v. Berryman, Dick.* 168. *Da Costa v. De Pas*. In *A. G. v. Herrick* and in *A. G. v. Peacock, Finch*, 245, as reported *sub nom.* *A. G. v. Matthews*, 2 Lev. 167, the Lord Chancellor himself seems to have brought the matter to the notice of the King; but this has not been the later practice. In *A. G. v. Baxter*, 1 Vern. 248, the Court proceed to appoint the use itself, when it clearly should have waited for the order under the sign manual. The order under the sign manual is directed to the Attorney-General, and requires him to make a motion for a decree disposing of the property in accordance therewith. *Da Costa v. De Pas*. *A. G. v. Berryman*. *Cary v. Abbot*. For forms of the order under the sign manual, and the decree made thereon, see *Da Costa v. De Pas*, and *A. G. v.*

ist; and therefore gifts to corporations not in being are void for remoteness. These States are, or were, as follows:—

§ 609. *New York*.—Under the Revised Statutes no power of carrying out a trust *cy pres* existed in the courts, and a gift for charitable purposes to any corporation or person not in being at the date of the gift was bad for remoteness.¹ This result was reached only after great fluctuation of judicial opinion. But it is fortunately no longer necessary to refer to the many conflicting and confusing cases on this point, for the Court of Appeals, in the case of *Allen v. Stevens*,² has decided that the Statute of 1893, c. 701, has repealed the provisions of the Revised Statutes, so far as they touch the question of the remoteness of gifts for charities, and has restored the ancient law.³

§ 610. *Michigan, Minnesota, and Wisconsin*.—In these

Berryman. An order under the sign manual may be obtained before any proceedings in Court, and then on the Attorney-General's information, setting out the order, the Court will make a complete and final decree, ordering the disposition of the property in accordance therewith. *A. G. v. Syderfen*, 1 Vern. 224; s. c. 7 Ves. 43, note, with form of decree. This prerogative of the Crown is not a judicial power, and it is universally agreed that no courts of equity in the United States possess it. 4 Kent, Com. (12th ed.) 508, note 1. *Jackson v. Phillips*, 14 Allen, 539, 574 *et seq.*

¹ *Bascom v. Nichols*, 1 Redf. 340; *sub nom.* *Bascom v. Albertson*, 34 N. Y. 584. *Sherwood v. Am. Bible Soc.*, 1 Keyes, 561. *White v. Howard*, 46 N. Y. 144.

² 161 N. Y. 122. See *Matter of Shattuck*, 193 N. Y. 446. Cf. *Fra-llick v. Lyford*, 107 N. Y. Ap. D. 543, 187 N. Y. 524.

³ The Court justly says (p. 140) that the provisions of the Revised Statutes have produced "nothing but wrecks of original charities, charities that were dear to the hearts of their would-be founders, and the execution of which would have been of inestimable value to the public."

The Revised Statutes of New York were regarded with great complacency and admiration at the time of their enactment, but, at least on the subjects of trusts and remote limitations, they have produced a woful amount of confusion and litigation. §§ 748–750, *post*. *Gray, Restraints on Alienation* (2d ed.), App. I. It would be a great boon to the courts and people of New York, though it is, perhaps, too much to hope for, if the old law, not only of charitable trusts, but of all trusts and of future estates could be restored.

States the provisions of the Revised Statutes of New York have been adopted as to real estate, though not as to personalty.¹ In Michigan the courts have followed the construction given to the statutes by the New York courts.² So in Minnesota.³ In Wisconsin the question is undetermined.⁴

§ 611. *Maryland.* — The Courts here originally rejected the *cy pres* doctrine, and held devises for charitable purposes to any corporation not in existence at the date of the gift to be bad.⁵ The objection seems to have been put on the ground of uncertainty rather than remoteness.⁶ But now, by Statute,⁷ no devise or bequest for any charitable uses shall be held void by reason of any uncertainty with respect to the donees thereof, if the will shall contain "directions for the formation of a corporation to take the same," and, within twelve months from the probate of such will, a "corporation shall be formed, in correspondence with such directions, capable, and willing to receive and administer such devise or bequest." The Court of Appeals has held that, under this Statute, a devise to trustees of land to be held for the object and purposes of a home for des-

¹ See § 751, *post*.

² *Methodist Church v. Clark*, 41 Mich. 730. *State v. Holmes*, 115 Mich. 356. Trusts for charitable purposes are void in Michigan, apart from any question of perpetuity. *Hopkins v. Crossley*, 132 Mich. 612.

³ *Little v. Willford*, 31 Minn. 173. *Atwater v. Russell*, 49 Minn. 22, 57. But see Minn. Gen. Sts. (1894), § 3048.

⁴ *Harrington v. Pier*, 105 Wis. 485, 494. See *Hood v. Dover*, 107 Wis. 149.

⁵ *State v. Warren*, 28 Md. 388.

⁶ *Needles v. Martin*, 33 Md. 609. *Church Extension v. Smith*, 56 Md. 362. *Barnum v. Baltimore*, 62 Md. 275. *Maught v. Getzen-danner*, 65 Md. 527. But cf. *Ould*

v. Washington, 1 McArth. 541; 95 U. S. 303, 313; § 607, note, *ante*. It has been contended that the provision in the Bill of Rights (Md. Const. of 1867, Bill of Rights, Art. 38) that all gifts of land or devises or bequests for religious purposes, "without the prior, or subsequent, sanction of the Legislature, shall be void," renders such gifts, devises, and bequests void, as dependent upon a remote contingency, but the courts have decided against this contention. *England v. Prince George's Parish*, 53 Md. 466. *Church Extension v. Smith*, *ubi sup.* *Bennett v. Methodist Episcopal Church*, 66 Md. 36.

⁷ St. of 1888, Ch. 249; 2 Md. Pub. Laws (1904), Art. 93, § 322.

titute, aged, and infirm women, with a direction that the trustees might, if they judged it best, become a body corporate, either under a special charter or under the general laws, was good.¹

§ 612. *Alabama*. — It would rather seem from the language in *Cater v. Balfour*² that a charitable devise to a corporation not in being would not be good in Alabama.³

§ 613. *Tennessee*. — In this State it seems that a gift to a corporation not in being cannot be sustained.⁴

§ 614. *Indiana*. — The doctrine of *cy pres* is repudiated in Indiana.⁵ In that State, therefore, it is presumed, a charitable gift to a corporation not in being would be void for remoteness.

§ 615. But although the disallowance of charitable gifts to corporations not in being seems to be the logical consequence of repudiating the doctrine of *cy pres*, yet there are some States whose courts repudiate the doctrine of *cy pres*, and yet support charitable gifts to corporations not in existence, or not having the necessary powers at the time of the gift.

§ 616. *Virginia*. — In Virginia the doctrine of *cy pres* does not exist.⁶ But in *Literary Fund v. Dawson*⁷ a testator

¹ Chase v. Stockett, 72 Md. 235. As to the extraordinary doctrine held in Maryland, that while a gift to a charitable corporation is good, a gift to trustees in trust for a charitable corporation is bad, see Missionary Soc. v. Humphreys, 91 Md. 131; § 245 c (7), ante.

² 19 Ala. 814, 830.

³ But see Williams v. Pearson, 38 Ala. 299. Cf. Burke v. Roper, 79 Ala. 138, 143.

⁴ See Green v. Allen, 5 Humph. 170; Dickson v. Montgomery, 1 Swan, 348; White v. Hale, 2 Coldw. 77; Rhodes v. Rhodes, 88 Tenn. 637.

⁵ Grimes v. Harmon, 35 Ind. 198.

⁶ See Baptist Ass. v. Hart, 4

Wheat. 1; Gallego v. A. G., 3 Leigh, 450; Janey v. Latane, 4 Leigh, 327; Wheeler v. Smith, 9 How. 55; Seaburn v. Seaburn, 15 Grat. 423; Kelly v. Love, 20 Grat. 124; Kain v. Gibboney, 101 U. S. 362. The previous decisions on the Virginia law were disapproved, if not overruled, and the doctrine of *cy pres* favored, if not established, in Protestant Episcopal Education Soc. v. Churchman, 80 Va. 718, and Trustees v. Guthrie, 86 Va. 125, but these two cases have been in their turn condemned by Fifield v. Van Wyck, 94 Va. 557, and the existence of the doctrine of *cy pres* in Virginia has been again denied.

⁷ 10 Leigh, 147.

directed that certain property should be used by his executors "in constituting a part of the Literary Fund of the State" for certain purposes, and added: "An Act of Assembly for said object supposed can be obtained." The Literary Fund was a corporation, but it had no authority to employ money for the purposes indicated by the testator. The Court of Appeals decided that the executors held the fund in trust to procure an Act of Assembly authorizing the Literary Fund to receive it. The Court met the objection of remoteness, which had been raised, by saying that, as the executors were to procure the Act, it would be procured during lives in being.

§ 617. Afterwards an Act of Assembly was passed authorizing the Literary Fund to take the gift; but the executors objected to the Fund taking it, because the Act had been passed without their consent and against their wishes. The Court of Appeals held that their consent was unnecessary. This, however, knocked the ground from under the position which the Court had relied on to meet the objection of remoteness. For if the consent of the executors was unnecessary, then the Act of Assembly need not be passed in their lifetime. The Court was, therefore, obliged to find a new reason for supporting the gift, and they now said that it was the implied intention of the testator that the Act should be procured within a reasonable time, and that whatever such reasonable time might be, it certainly did not exceed the limit fixed by the Rule against Perpetuities.¹

§ 618. It is to be observed that this decision imports into the will, as a condition precedent of the gift, that the Legislature

¹ *Literary Fund v. Dawson*, 1 Rob. 402, 421, 422, 429, 430, 434. "I think it clear that it was the testator's intention the Legislature should act upon the subject in a reasonable time. If, when he said 'an Act of Assembly for said object supposed can be obtained,' he had added the words, 'in a reason-

able time,' could any one doubt that the devise would have been defeated by an unreasonable delay in the passage of a law? And yet how can it be supposed that his meaning was otherwise? and 'to attain the intent' shall not 'implication supply verbal omissions'?" 1 Rob. 421, 422.

shall act within a reasonable time, and imputes to the testator the intention that if it does not act within such reasonable time the charitable gift shall be void. Surely a somewhat violent implication. One may doubt whether it would have commended itself to the learned Court, unless it had been a means of escaping from the fetters in which early decisions have confined the judicial administration of charitable trusts in Virginia.¹

§ 619. *West Virginia*. — The Virginia decisions repudiating the doctrine of *cy pres* are followed in this State.²

§ 620. *North Carolina*. — In North Carolina the doctrine of *cy pres* appears to be denied.³ The following passage⁴ suggests that the same device may be adopted to sustain a charitable gift to a corporation not in being as is employed in Virginia: "A bequest for religious charity must, like others, be to some definite purpose, and to some body or association of persons, having a legal existence, and with capacity to take. Or, at the least, it must be to some such body, on which the Legislature shall, within a reasonable time, confer a capacity to take."⁵

§ 621. *Connecticut*. — There was a Statute in this State, passed in 1784, which provided that "no estate in fee simple, fee tail, or any less estate, shall be given, by deed or will, to any persons but such as are, at the time of making such deed or will, in being, or to their immediate issue or descendants."⁶ This statute was amended in 1884,⁷ by substituting for "making such deed or will," the words "the delivery of such deed

¹ It has been followed in *Kinnaird v. Miller*, 25 Grat. 107.

² *Carpenter v. Miller*, 3 W. Va. 174. *Bible Soc. v. Pendleton*, 7 W. Va. 79. *Mong v. Roush*, 29 W. Va. 119. *Wilmoth v. Wilmoth*, 34 W. Va. 426. *Pack v. Shanklin*, 43 W. Va. 304.

³ *McAuley v. Wilson*, 1 Dev. Eq. 276. *Holland v. Peck*, 2 Ired. Eq. 255. *White v. University*, 4

Ired. Eq. 19. *Bridges v. Pleasants*, Id. 26. (But see *Griffin v. Graham*, 1 Hawks, 96; *Miller v. Atkinson*, 63 N. C. 537.)

⁴ *Bridges v. Pleasants*, 4 Ired. Eq. 30.

⁵ And see *Griffin v. Graham* and *Miller v. Atkinson*, *ubi sup.*

⁶ Conn. Gen. Sts. (Rev. of 1875), tit. 18, c. 6, pt. 1, § 3.

⁷ Conn. St. 1884, c. 87.

or the death of the testator." In the revision of the Probate Laws, made in 1885,¹ the following clause was inserted: "No devise of any estate, except for public and charitable uses, or for the care of cemeteries or graves, shall be made to any persons, but such as are at the time of the death of the testator in being, or to their immediate issue or descendants." Both the Statute of 1784, as amended in 1884, and the Statute of 1885 were incorporated in the General Statutes of 1888;² but both were repealed in 1895;³ so that the common law on the subject of remoteness is now restored in Connecticut.⁴ A statute passed originally in 1684⁵ provided that "all estates that have been or shall be granted for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for any other public and charitable use, shall forever remain to the uses to which they have been or shall be granted, according to the true intent and meaning of the grantor, and to no other use whatever."⁶

The doctrine of *cy pres* was formerly held not to be in force in Connecticut.⁷ But in *Coit v. Comstock*⁸ (1883) there was a devise to trustees to receive the rents and income "until an act of incorporation can be obtained from the General Assembly of the State of Connecticut, by the name of the Smith Memorial Home, . . . and to convey, transfer, assign and deliver the

¹ Conn. St. 1885, c. 110, § 130.

² Conn. Gen. Sts. (Rev. of 1888), §§ 2952, 537.

³ Conn. St. 1895, c. 249.

⁴ And it has now been held that even before the repeal of the statutes, charitable devises were not within them, but only within the common-law Rule against Perpetuities. *Pendleton v. Kinney*, 65 Conn. 222.

⁵ See Conn. Gen. Sts. (Rev. of 1875), p. 352, note.

⁶ By St. of 1885, c. 36, a like provision was made as to estates granted for the "maintenance of

any cemetery, cemetery lot, or of the monuments therein," and the St. of 1684, with the incorporation of the St. of 1885, c. 36, was reenacted in the Gen. Sts. (Rev. of 1888), § 2951. Gen. Sts. (Rev. of 1902), § 4026.

⁷ *White v. Fisk*, 22 Conn. 31. *Hughes v. Daly*, 49 Conn. 34. *Fairfield v. Lawson*, 50 Conn. 501. *Bristol v. Bristol*, 53 Conn. 242. See *Treat's Appeal*, 30 Conn. 113; *Adye v. Smith*, 44 Conn. 60; *Dailey v. New Haven*, 60 Conn. 314.

⁸ 51 Conn. 352.

said trust fund, with its accumulations, to the corporation created by such act, as soon as such corporation shall be duly organized. The purpose and object of this bequest is the founding of a home for aged, respectable, indigent women, who have been residents of the City of New London, under such regulations as may be prescribed or provided by such act of incorporation." After the testator's death the Smith Memorial Home was incorporated. The Court of Errors held that it was entitled to the devise.

§ 622. However desirable it may have been to reach this conclusion, the mode taken to reach it is not clear. In *Jocelyn v. Nott*,¹ where a gift to a charity was held void as subject to a remote condition precedent,² the Court say: "The fact that this may be regarded as a charitable devise does not exempt it from the operation of the Rule [against Perpetuities]. The Common-Law Rule and our own Statute are without exception. All devises or grants, whether for charitable uses, or otherwise, must vest, if they vest at all, within the time limited. The devise in the present case is vested only in the trustees, and no interest whatever has as yet vested in the party intended to be benefited."

§ 623. The Court in *Coit v. Comstock* say: "It is clear, therefore, that a reasonable time only for the act to be obtained was contemplated by the testator."³ But (1) the Connecticut Statute⁴ then in force provided that no estate should be given by will⁵ except to persons in being, or their immediate issue or descendants; and (2) to support incorporation within a reasonable time, as a condition precedent of the devise, required the imputation to the testator of the intention that if the incorporation was not had within a reasonable time the gift should be void.⁶ This conclusion, however, the Court avoid; they say: "What would have become of the property if an act of incorporation had not been

¹ 44 Conn. 55.

² See §§ 605, 606, *ante*.

³ 51 Conn. 383.

⁴ § 621, *ante*.

⁵ But see § 624 *a*, *post*.

⁶ See § 618, *ante*.

procured within such reasonable time, it is not necessary to consider.”¹

§ 624. Still more difficult is “another view of this question,” which the Court take: “The testator,” they say, “in this bequest declares his object and purpose to be the founding of a home for the aged, &c., which should endure forever. He realized that men must die, but corporations never die. He desired, therefore, to have the charity under the management and administration of a corporation that should endure as long as the home should exist. To carry out this object he gives the property to his executors, to be transferred to the corporation as soon as it should be chartered and organized. The instrumentality of the executors was employed merely to pass the title to the corporation. Nothing is said in the will as to the beneficial interest in the property becoming vested in the beneficiaries when the property should be conveyed to the corporation. It became vested in them on the death of the testator liable to be divested if a corporation should not be organized within a reasonable time under all the circumstances. There is no room for claiming that the property did not vest till the conveyance should be made to the corporation. The charity could not be administered till then, but its administration had nothing to do with the vesting of the property, any more than the possession of property by a devisee has to do with the vesting of the same in him. Reversionary interests vest in a party when the possession of the property is in another. So here, the property became vested on the death of the testator, but the time when the beneficiaries should enjoy the charity was deferred till the corporation should become organized and the property conveyed.” There was certainly here an immediate intention to devote to charity, which, if it could not be carried out precisely as directed, could be carried out *cy pres*; but to repudiate the doctrine of *cy pres*, and to say that all respectable old women who had lived in New London, or should live there to the end of the world, and who should be designated by a

¹ 51 Conn. 384. See Tappan's Appeal, 52 Conn. 412.

non-existent corporation, had a vested interest at the death of the testator is, it is submitted, playing with words.¹ It would have been better to say frankly that the Court had erred in repudiating the doctrine of *cy pres*.²

§ 624 *a*. By a statute passed in 1880,³ where land is held under a trust created by deed, and the execution of the trust in exact accordance with the terms of the deed is impossible or must necessarily fail to secure the objects manifestly intended by the grantor, the Superior Court may order the sale of the land and the investment of the proceeds, for the benefit of the party beneficially interested in such manner as the Court "may deem the most proper to secure the object for which said trust was originally created, as near as may be, according to the intent of the original grantor appearing in the original deed." In *Woodruff v. Marsh* ⁴ (1893) Baldwin, J., says: "Whether . . . the equitable jurisdiction of the Superior Court, which has been thus expressly authorized to apply the *cy pres* doctrine to trusts created by deed, ought not to be now deemed to include authority to deal in the same manner with charitable trusts created by will, it is unnecessary to determine in the present case." One may perhaps anticipate that when the question is presented for determination, the Supreme Court of Errors may see their way to place the desirable conclusion reached in such a case as *Coit v. Comstock* upon the doctrine of *cy pres* rather than on the questionable reasoning of that case.⁵

§ 625. *Iowa*. — It has been said in Iowa that the doctrine of *cy pres* is not there in force; nevertheless, a devise to a corporation to be organized is good.⁶ The objection of remoteness

¹ See *White v. Howard*, 38 Conn. 342.

² See *Tappan's Appeal*, 52 Conn. 412; *Goodrich's Appeal*, 57 Conn. 275; *New Haven Young Men's Institute v. New Haven*, 60 Conn. 32; *Woodruff v. Marsh*, 63 Conn. 125. Cf. *Belfield v. Booth*, 63 Conn. 299; §§ 214 *b*, *et seq.*, *ante*.

³ St. of 1880, c. 42; Conn. Gen. Sts. (Rev. of 1888), § 778. Gen. Sts. (Rev. of 1902), § 1034.

⁴ 63 Conn. 125, 136.

⁵ See *Eliot's Appeal*, 74 Conn. 586; *Duggan v. Slocum*, 83 Fed. Rep. 244.

⁶ *Miller v. Chittenden*, 2 Iowa, 315; 4 Iowa, 252. See *Johnson v.*

does not seem to have occurred to the Court. The same criticism can be made on the Iowa cases as on those in Virginia and Connecticut.¹

§ 626. That a charitable gift to a corporation not *in esse* is good has long been accepted doctrine in Pennsylvania.² In *Zeisweiss v. James* ³ a devise to "the Infidel Society in Philadelphia hereafter to be incorporated, and to be held and disposed of by them for the purpose of building a hall for the free discussion of religion, politics, &c.," was held bad. The objection to the devise would seem to have been, not that it was to a corporation not *in esse*, but that it was not charitable.⁴

§ 626 *a*. If there was any doubt as to the existence in Pennsylvania of the doctrine of *cy pres* or as to the validity of a devise for a charitable purpose to a corporation not *in esse*, it is removed by recent statutes which establish the doctrine of *cy pres* in a very broad form.⁵

Mayne, 4 Iowa, 180; *Byers v. McCartney*, 62 Iowa, 339. But cf. *Phillips v. Harrow*, 93 Iowa, 92.

¹ §§ 615-624, *ante*.

² *Witman v. Lex*, 17 S. & R. 88, 93. See *Foulke*, Treatise, §§ 766-781, 786.

³ 63 Pa. 465.

⁴ The "building a hall for the free discussion of religion, politics, &c." seems hardly to come within any of the definitions of a charity, even if the hall be not regarded, as it was by the Supreme Court of Pennsylvania, as "a nursery of vice, a school of preparation to qualify youngmen for the gallows and young women for the brothel." 63 Pa. 471.

Cf. *Knight's Estate*, 159 Pa. 500; *Cowan v. Milbourn*, L. R. 2 Ex. 230; *Pringle v. Napanee*, 43 U. C. Q. B. 285; *Kinsey v. Kinsey*, 26 Ont. 99; *In re Jones*, [1907] South Aust. L. R. 190; *Tyssen*, Char. Beq., 114.

The last sentence of this section originally read: "The objection to the devise was not," &c. The author's learned friend, the late Arthur Biddle, Esq., of the Philadelphia bar, pointed out to him, that this might be taken as expressing not merely the opinion of the author, but that of Sharswood, C. J., who delivered the opinion in *Zeisweiss v. James*, and that, if so taken, the statement was not correct. The criticism was just, and the expression has been changed. But it does not seem likely that the Chief Justice would have considered a bequest to a corporation not *in esse* as void, if there was an intention to devote immediately to charity. Fortunately the Statutes mentioned in the next section have probably settled the question.

⁵ *Brightly* Purd. Dig. (ed. 1894), p. 302. Suppl. 1895, p. 2536. See *Pepper's Estate*, 11 Pa. C. C. 257;

§ 627. In England it has been not uncommon to give advowsons to trustees in trust to appoint clergy of particular opinions and no others. A sale of these advowsons would be a breach of trust on the part of the trustees. They are accordingly inalienable. It has been assumed that such gifts are good; but Mr. Lewis points out, with great force, that they can be good only as charitable gifts, and that they are not charitable.¹ This question, however, concerns the inalienability of present estates, and not the creation of future estates, and has therefore no real place in this treatise.²

§ 628. Provisions directing accumulations for charitable trusts are discussed in the chapter on Accumulations.³

Lewis's Estate, Id. 561; Lennig's Estate, 154 Pa. 209. But cf. Houston's Estate, 28 Pa. C. C. 285.

¹ Lewis, Perp. 693-708.

² Cases since Lewis are *Carter v. Cropley*, 8 De G. M. & G. 680; *Shaw v. Thompson*, 3 Ch. D. 233. The validity of these trusts has been assumed in them. See also *Faulkner v. Elger*, 4 B. & C. 449;

6 D. & R. 517; *A. G. v. Webster*, L. R. 20 Eq. 483, 491; *In re St. Stephen*, 39 Ch. D. 492; *In re Hunter*, [1897] 1 Ch. 518; reversed, [1897] 2 Ch. (C. A.) 105; *In re Church Patronage Trust*, [1904] 1 Ch. 41; 116 Law T. 495; [1904] 2 Ch. 643; *Marsden*, Perp. 309-311.

³ §§ 677-679 *a*, *post*.

CHAPTER XIX.

CONSTRUCTION.

§ 629. THE Rule against Perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied.¹

§ 630. This is expressed by several of the judges in their opinions given to the House of Lords in the case of *Dungannon v. Smith*.² Thus Mr. Justice Maule: "The existence of the Rule as to Perpetuities is certainly no reason for altering the construction of the bequest."³ Mr. Justice Patteson: [The will must] "be construed without reference to any rule of law respecting remoteness; that is, in the first instance, and for the sole purpose of ascertaining the testator's meaning."⁴ Baron Parke: "Our first duty is to construe the will; and this we must do, exactly in the same way as if the Rule against Perpetuity had never been established, or were repealed when the will was made; not varying the construction in order to avoid the effect of that rule, but interpreting the words of the testator wholly without reference to it."⁵

§ 631. To the same effect is the language of many other

¹ See *Andrews v. Lincoln*, 95 Me. 541, 544.

² 12 Cl. & F. 546.

³ P. 578.

⁴ P. 588.

⁵ P. 599.

cases.¹ So a provision void for remoteness is still to be resorted to for construing the rest of the will.²

§ 632. But it is hardly in human nature for judges not to be influenced by the natural desire to construe deeds and wills so as to carry out, as far as possible, the intention of settlors and testators, rather than so as to defeat such intention, particularly when the rule which threatens it is harsh in its application, which the Rule against Perpetuities, however beneficial its general operation, undoubtedly often is; and therefore constructions have sometimes been put, almost unconsciously, on wills which the courts would never have adopted had the Rule against Perpetuities not existed.³ It is

¹ *Speakman v. Speakman*, 8 Hare, 180, 185, 486. *Cattlin v. Brown*, 11 Hare, 372, 375, 376. *Taylor v. Frobisher*, 5 De G. & Sm. 191, 197. *Pearks v. Moseley*, 5 Ap. Cas. 714, 719, 733. *Stuart v. Cockerell*, L. R. 5 Ch. 713. *Heasman v. Pearse*, L. R. 7 Ch. 275, 283. *Re Mervin*, [1891] 3 Ch. 197, 200, 201. *Re Bowen*, [1893] 2 Ch. 491, 496. *In re Hume*, [1912] 1 Ch. 693. *Coggins's Appeal*, 124 Pa. 10, 29. *Hewitt v. Green*, 77 N. J. Eq. 345. *Hutchinson v. Tottenham*, [1898] 1 I. R. 403, 418. Compare *Cunliffe v. Brancker*, 3 Ch. D. 393, 399; *Harvey v. Stracey*, 1 Drew. 73, 126, 127; *Macpherson v. Stewart*, 28 L. J. Ch. 177, 178; 32 L. T. 143; *Bulteel v. Plummer*, L. R. 6 Ch. 160, 165; *Re Watkins*, 37 W. R. 609, 610; *Re Turney*, [1899] 2 Ch. 739, 744, 747; *Re Stickney's Will*, 85 Md. 79, 101; *Graham v. Whitridge*, 99 Md. 290; *Taylor v. Blake*, [1912] 1 I. R. 1; *Ferguson v. Ferguson*, 2 Can. S. C. 497; *Marsden, Perp.* 262 *et seq.*; 1 Jarm. Wills (6th ed.) 364; *Farwell, Pow.* (2d ed.) 290. The decision in *Dean v. Mumford*,

102 Mich. 510, seems questionable. On the effect of some limitations in an instrument being too remote upon the other limitations, see §§ 247 *et seq.*, *ante*.

² "It is against the settled rules of construction to strike out any words from a will because they offend against the perpetuity rule. For all purposes of construction, the will must be read as if no such rule existed. Any dispositions which, so reading and construing it, are found to be the testator's wishes must be taken to be his wishes, and if those wishes offend against the rule, the gifts would fail, and must fail accordingly; but they are not the less part of his will, and to be resorted to as part of the context for all purposes of construction, as if no such rule had been established." *Per James, L. J.*, *Heasman v. Pearse*, L. R. 7 Ch. 275, 283, disapproving remarks of *Malins, V. C.*, in s. c. L. R. 11 Eq. 522, 535. See *Marsden, Perp.* 276.

³ The most striking instance of this is shown by the slight distinctions at which courts have clutched

obvious that this irregular action of the judicial mind cannot be defined or foretold.

§ 633. But there is a legitimate use of the Rule against Perpetuities in matters of construction. When the expression which a testator uses is really ambiguous, and is fairly capable of two constructions, one of which would produce a legal result, and the other a result that would be bad for remoteness, it is a fair presumption that the testator meant to create a legal rather than an illegal interest. While it is not to be conclusively presumed that a testator knew the Rule against Perpetuities, for such a presumption would often involve the absurdity that a testator intended to make a will which he was aware the law would not carry into effect, there is, on the other hand, no presumption that he did not know it; and therefore the fact that a provision would be too remote, if construed in a certain way, is a reason for supposing that it was not intended to be construed in that way, which, although it cannot avail against a clear form of words, may well be held to govern when the expression is ambiguous.¹ Especially is

in construing gifts of personalty after failure of issue, for the purpose of cutting down failure of issue to failure of issue at a certain time, instead of giving it the meaning of indefinite failure of issue, which it ordinarily bears, but which would have the effect of making a gift over of personalty too remote. See particularly *Forth v. Chapman*, 1 P. Wms. 663; and compare §§ 211–213, *ante*; *Marsden, Perp.* 265 *et seq.*; 1 *Jarm. Wills* (6th ed.) 365.

¹ See *Co. Lit.* 42 *a*, *b*; *Atkinson v. Hutchinson*, 3 P. Wms. 258, 260; *Keiley v. Fowler*, *Wilm.* 298, 307; *Thellusson v. Woodford*, 4 Ves. 227, 312; *Leach v. Leach*, 2 Y. & C. C. C. 495, 499; *Liley v. Hey*, 1 Hare, 580, § 408, *ante*;

Christie v. Gosling, L. R. 1 H. L. 279, 290; *Pearks v. Moseley*, 5 Ap. Cas. 714, 719; *Re Bevan's Trusts*, 34 Ch. D. 716, 718; *Re Turney*, [1899] 2 Ch. 739, 747; *In re Hume*, [1912] 1 Ch. 693, 698; *Gray v. Whittemore*, 192 Mass. 367; *Farnam v. Farnam*, 53 Conn. 261, 280; *Woodruff v. Marsh*, 63 Conn. 125, 136; *St. John v. Dann*, 66 Conn. 401, 405; *Wolfe v. Hatheway*, 81 Conn. 181; *Carpenter v. Perkins*, 83 Conn. 11; *Butler v. Butler*, 3 Barb. Ch. 304, 310; *Post v. Hover*, 33 N. Y. 593, 601; *Du Bois v. Ray*, 35 N. Y. 162, 166, 167, 171; *Wolf's Estate*, 9 W. N. C. (Pa.) 260; *Coggins's Estate*, 124 Pa. 10, 29; *McBride's Estate*, 152 Pa. 192; *Siddall's Estate*, 180 Pa. 127; *Re Stickney's Will*, 85 Md. 79, 101

this the case if the testator shows, by other provisions of his will, that, when making it, he has had the Rule against Perpetuities in his mind.¹ And probably estates void for remoteness would not be raised by implication.²

§ 633 *a*. In *In re Finch's Contract*³ a donee of a special power appointed on the trusts of a prior instrument, or such of them as "are capable of taking effect." Held, that if some of the trusts failed as infringing upon the Rule against Perpetuities, such trusts might be considered as excluded from the appointment.

§ 634. There are some cases deserving attention in which rules of construction have been, or are supposed to have been, unduly warped in order to prevent remoteness. They are *Mogg v. Mogg*,⁴ *Leach v. Leach*,⁵ *Kevern v. Williams*,⁶ and *Elliott v. Elliott*.⁷

§ 635. (1) *Mogg v. Mogg*.⁸ In this case several matters under a will were referred to the Court of King's Bench. One was the construction of a devise of an estate called in the case the Lower Mark estate. The testator had given it to trustees to apply the rents towards the maintenance "of the child and children, begotten and to be begotten," of his daughter S. "during his, her, and their life and lives;" and after the death of such children he "gave and devised the said estate to the lawful issue of such child and children" of said S., "to hold unto such issue, his, her, and their heirs, as tenants in common without survivorship." As to this Lower Mark es-

et seq.; *Heisen v. Ellis*, 247 Ill. 418; *McCutcheon v. Pullman Bank*, 251 Ill. 550; *Hancock v. Butler*, 21 Tex. 804, 806; *Klingman v. Gilbert*, 90 Kans. 545; *In re Hobson's Will*, [1907] Vict. L. R. 724, 737; *Moule v. Overton*, 16 N. Z. L. R. 106, 114; *Marsden, Perp.* 208. Cf. *Dime Savings Co. v. Watson*, 254 Ill. 419.

¹ *Martelli v. Holloway*, L. R. 5 H. L. 532, 548.

² See *Chapman v. Brown*, 3 Burr. 1626; *Lewis, Perp. c.* 26; *Suppl.* 172; 1 *Jarm. Wills* (6th ed.) 366.

³ [1903] 2 Ch. 486.

⁴ 1 Mer. 654.

⁵ 2 Y. & C. C. C. 495.

⁶ 5 Sim. 171.

⁷ 12 Sim. 276.

⁸ 1 Mer. 654. See *Lewis, Perp.* 590; *Marsden, Perp.* 266.

tate, as well as to other estates, several questions were put to the judges. The first three related to the interests of the children of S. (four of whom had been born in the lifetime of the testator, and five after his death) in the estates. The fourth question was this: "Whether the grandchildren of S. (being the issue of such of her children as were living at the date of the will, or of such of her children as were born after the date of the will, and prior to the testator's decease, or of such of her children as were born subsequently to the testator's decease) take any and what estates in the several properties?"¹ The Court gave no opinion, but sent answers to the queries. To the fourth query they said "that the issue of such of S.'s children as were born prior to the testator's decease take an interest in the Lower Mark estate as tenants in common in fee simple expectant upon the determination of the estate limited" to the trustees, "but that none of the issue of such of S.'s children as were born after the testator's death take any interest in the Lower Mark estate, and that none of the grandchildren take any interest, except as issue in tail, in any of the other property."² Sir William Grant, M. R., confirmed the certificate. He delivered no opinion, but the decree states that the nine children of S. took, as joint tenants, an equitable estate for their lives and the life of the survivor, with remainder in fee simple to the issue collectively of the four eldest of such children, as tenants in common.³ The elaborate and able arguments before the King's Bench and the Master of the Rolls were directed to the question of the children's

¹ P. 663.

² P. 689. It is possible that the judges may have meant that the gift was of each child's share to its issue, and that the gifts to the issue of those children of S. who were born in the testator's lifetime were good, while the gifts to the issue of those children of S. who were not born in the testator's lifetime were

too remote. It is to be observed that their words are, that the former issue "take an interest in the Lower Mark estate as tenants in common in fee simple," not that they take the whole estate. No such explanation, however, can be given of the decree in Chancery.

³ 1 Mer. 706.

estate. The question who of the grandchildren were to take in remainder does not seem to have been discussed.

§ 636. No case approaches this in its disregard of ordinary rules of construction for the purpose of avoiding remoteness. It might fairly enough have been contended that children of S., born after the testator's death, were not intended to take; but to hold that it was intended that all the children should take life interests, and yet that the issue of only some should take the whole in remainder, seems extravagant. The decision in *Mogg v. Mogg* is unlikely to be followed at the present day.

§ 637. (2) *Leach v. Leach*.¹ Here there was a gift, on the death of the testator's wife, brother, and sister, to E., the eldest daughter, and the other children of the testator's brother, in equal shares, for their lives, the principal to be divided among the issue of said E. and the other children of the testator's brother in equal shares. Vice-Chancellor Knight Bruce held, "though not without some doubt," that the testator intended to give to those children only of his brother who were alive at his own death. This seems to have been an unjustifiable straining of the construction. Ordinarily all children born before the time of vesting in possession (which the Court held was not until the death of the wife, brother, and sister) would be considered as intended to take.

§ 638. (3) *Kevern v. Williams*.² A testator gave personal property to trustees, after the death of his wife, in trust for the grandchildren of his brother, to be by each of them received when they and each of them should severally attain twenty-five and not before. It was held that only those grandchildren who were born before the death of the testator's widow should share in the property. This case has been spoken of as one where the ordinary canons of construction were violated to avoid the objection of remoteness.³ But, *assuming that the*

¹ 2 Y. & C. C. C. 495.

² 5 Sim. 171.

³ Marsden, Perp. 105, 106, 110,

See Lewis, Perp. 525; *Ker v. Hamilton*, 6 Vict. L. R. Eq. 172, 175.

266. Theob. Wills (7th ed.) 380.

postponement of payment was too remote, it is submitted that the decision was correct. The general rule of law is that, upon a gift to a class, only those are included who are in existence at the time of distribution; and the time of distribution is considered to be when the first of the class is entitled to his share. Now here the brother's grandchildren took an absolute indefeasible interest; there was no gift over; the restraints imposed upon the reception of the fund were nugatory.¹ Therefore all of the brother's grandchildren who were alive at the death of the widow were entitled at once to their shares; that was the time of distribution; the class was then closed; and no after-born grandchildren could take.

§ 639. It is true that although a restriction on the reception of an interest indefeasibly vested cannot be created for the supposed benefit of the recipient, yet it will be upheld when it may be for the benefit of other persons; for their sake the period of distribution may be postponed, and so long as distribution is postponed, the class to take may be increased.² And further, if, by giving effect to a direction for postponement of payment of an indefeasibly vested gift to a class, the class itself may be increased, the time for distribution will be postponed. Thus in *Oppenheim v. Henry*³ a testator directed property to be held in trust for his grandchildren, to be divided equally among them at the end of twenty years after his death. Wood, V. C., held that the grandchildren had a vested interest, but that all born before the end of the twenty years were entitled.

¹ See Chap. IV., *ante*; Gray, *Restraints on Alienation* (2d ed.), §§ 106-112, 297, 298.

² Thus when a gift to a class on reaching a certain age is accompanied by a valid gift over on failure of any member of the class to reach that age, all members of the class coming into existence before the eldest reaches the required age are allowed to share. *Andrews v. Partington*, 3 Bro. C. C. 401.

Barrington v. Tristram, 6 Ves. 345. *Whitbread v. St. John*, 10 Ves. 152. *Balm v. Balm*, 3 Sim. 492. *Emmet's Estate*, 13 Ch. D. 484. See *In re Stephens*, [1904] 1 Ch. 322.

³ 10 Hare, 441. This case was incorrectly dealt with in the first edition.

The case, it is submitted, is sound. It appears to be the only direct decision upon the point.

§ 639 *a*. Still on the assumption that the postponement of payment in *Kevern v. Williams* was too remote, the difference between that case and *Oppenheim v. Henry* is that in the latter, the time to which payment was postponed was not too remote, and therefore the direction for postponement was allowed to operate for the benefit of after-born members of the class, while in the former, the time to which payment was postponed being too remote had to be rejected altogether, so that there was nothing to interfere with the ordinary application of the rule, and as the brother's grandchildren had absolutely vested interests payable at once, the class was necessarily confined to those who had been born before the death of the testator's wife.¹

§ 639 *a a*. Hitherto we have gone upon the assumption, which seems to have been generally made, that the postponement of payment in *Kevern v. Williams* was too remote; but is this correct? The eldest grandchild was ten years old at the testator's death. If he lived, he was entitled to payment of his share when he reached twenty-five; if he died his executor was entitled to payment, when, had he lived, he would have reached twenty-five;² on either alternative the time of distribution and the determination of the class would be within twenty-one years after a life in being and would not be too remote. It seems therefore that the decision in *Kevern v.*

¹ In *Blease v. Burgh*, 2 Beav. 221, there was a gift to the children of A., but not to be paid them till they reached twenty-three. There was a gift over, but it was held bad for remoteness. A. had one child, B., at the death of the testator. Afterwards he had another child, C. B. died under age, but C. reached twenty-three, and was appointed B.'s administrator. C. was held entitled to the gift. If he was to be included in the class, then he claimed partly in his own right, partly as administrator of

his brother; if he was not to be included, then, as administrator of his brother, he was entitled to the whole. The case, therefore, decides nothing as to the time of distribution and the ascertainment of the class. It is submitted, however, that C. was entitled, as his brother's administrator (though the opinion of Lord Langdale, M. R., seems to have been otherwise).

² *Chetser v. Painter*, 2 P. Wms. 335. *Roden v. Smith*, Amb. 588. *Maher v. Maher*, 1 L. R. Ir. 22.

Williams cannot be maintained, and that the class of grandchildren should have been allowed to increase until the eldest grandchild reached, or, if living, would have reached, twenty-five.¹

§ 640. (4) *Elliott v. Elliott*.² A testator gave his personal estate to his daughter's children, in equal shares, as and when they should attain their respective ages of twenty-two years, the interest on their respective shares to be accumulated and to be paid to them as and when the principal should be payable. Shadwell, V. C., held that the gift in question was a gift to such only of the daughter's children as were alive at the testator's death. If this was a vested interest, then the remarks above with reference to *Kevern v. Williams* apply to it. If it was a contingent gift, the decision would seem wrong.

§ 641. The case is near the line; if it had not been the gift of a residue it would probably have been contingent; but the fact that it was a gift of a residue is an argument in favor of vesting.³ Perhaps this may fairly be considered a case of sufficient ambiguity to justify a reference to the Rule against Perpetuities as indicating intention.⁴

¹ See §§ 121 *a*, 121 *b*, 442 *a*, *ante*; 679, *post*; Hawkins, Wills (2d ed.) 102. The author is indebted to his learned friend and former pupil, Professor Kales, for suggesting this criticism on *Kevern v. Williams*.

In 2 Jarm. Wills (6th ed.) 1679, note (*n*), Mr. Charles Sweet says: "I submit that as a direction postponing enjoyment of a vested interest beyond the age of twenty-one is void, the gift in *Kevern v. Williams* was in effect simply a gift to A. for life with remainder to the grandchildren of B." But, except for remoteness, such a direction, if made to allow a class to

increase, is, according to *Oppenheim v. Henry*, good. See § 639, *ante*.

² 12 Sim. 276.

³ See 1 Jarm. Wills (6th ed.) 365; 2 *id.* 1679; Theob. Wills (7th ed.) 309; Lewis, Perp. Suppl. 155, 171.

⁴ § 633, *ante*. See also *Mainwaring v. Beevor*, 8 Hare, 44. 48; *Gosling v. Gosling*, Johns. 265, 274. *Elliott v. Elliott* was followed by *In re Coppard*, 35 Ch. D. 350. See *In re Wenmoth's Estate*, 37 Ch. D. 266; *In re Mervin*, [1891] 3 Ch. 197; *Willerton v. Stocks*, [1892] W. N. 29; *In re Stevens*, [1896] W. N. 24; *In re Powell*, [1898] 1 Ch.

§ 642. In previous chapters have been considered the construction of limitations of personalty to go along with realty, "so far as law and equity will permit,"¹ the carrying out of executory trusts,² and the rejection of modifying and qualifying clauses when too remote.³

§ 643. *Cy pres.* — There is one well-recognized exception to the rule that the question of remoteness will not affect the construction of limitations expressed in unambiguous language. *When land is devised to an unborn person for life, remainder to his children in tail, either successively or as tenants in common with cross-remainders, the unborn person takes an estate tail; and when land is devised to an unborn person for life, remainder to his sons in tail male, either successively or as tenants in common with cross-remainders, the unborn person takes an estate tail male.*⁴ This is called the doctrine of *cy pres*.⁵

§ 644. The occasion for the construction *cy pres* of a devise to A. for life, remainder to his children in tail, as giving an estate tail to A., arises not only (1) when A. is unborn, and his children are therefore beyond the limits of the Rule against Perpetuities,⁶ but also (2) when A. is the object of a power, but his children are not. The same principles govern both classes of cases, and therefore both are in point here.

§ 645. (1) The first cases in which the doctrine of *cy pres*

227; *Re Barker*, 92 L. T. R. 831; *In re Hobson's Will*, [1907] Vict. L. R. 724, 730; 2 Jarm. Wills (6th ed.) 1679; Theob. Wills (7th ed.) 309; Tud. L. C. in Real Prop. (4th ed.) 424.

In *Wetherell v. Wetherell*, 4 Giff. 51, 1 De G. J. & S. 134, some of the class had reached majority at the testator's death (see 4 Giff. 54); and consequently the class was then closed without calling for any aid from the Rule against Perpetuities.

¹ See §§ 363–367, *ante*.

² See §§ 365, note, 418, *ante*.

³ See Chap. XIII., *ante*.

⁴ And a like method is to be pursued when a perpetual series of life estates is given. See §§ 652 *et seq.*, *post*.

⁵ *In re Mortimer*, [1905] 2 Ch. (C. A.) 502, 506. *Guy v. Guy*, 30 N. Z. 383. Wms. Real Prop. (22d ed.) 421. 1 Jarm. Wills (6th ed.) 288, 366. Hawkins, Wills (2d ed.) 223. This must not be confounded with the doctrine of *cy pres* in its application to charities. See §§ 607 *et seq.*, *ante*.

⁶ As, for instance, in *Vanderplank v. King*, 3 Hare, 1.

was applied were instances of carrying out executory trusts.¹ In *Nicholl v. Nicholl*² (1777) the doctrine of *cy pres* was applied to the devise of a legal estate, though the propriety of its application under the circumstances of the case has been questioned.³ In *Pitt v. Jackson*⁴ (1786) it was applied to the devise of a legal estate by Sir Lloyd Kenyon, M. R.⁵ This case has always been spoken of as going to the verge of the law,⁶ but it has also been always followed;⁷ and it is now settled that the doctrine of *cy pres* applies to direct devises, and not

¹ *Humberston v. Humberston*, 1 P. Wms. 332; 2 Vern. 737; Prec. Ch. 455; Gilb. Eq. 128 (1716). *Hucks v. Hucks*, 2 Ves. Sr. 568 (1754). See *Marlborough v. Godolphin*, 1 Eden, 404, 422, 423; *Godolphin v. Godolphin*, 1 Ves. Sr. 21, 23; *Mortimer v. West*, 2 Sim. 274, 282, 283; *Lyddon v. Ellison*, 19 Beav. 565, 573; 1 Jarm. Wills (6th ed.) 289; *Marsden, Perp.* 268 *et seq.*, § 418, *ante*.

² 2 W. Bl. 1159.

³ See § 647, *post*.

⁴ 2 Bro. C. C. 51.

⁵ The decree of the Master of the Rolls in this case was reversed, *sub nom.* *Smith v. Camelford*, 2 Ves. Jr. 698, by Lord Loughborough, C., on another point; but on the question of *cy pres* the Lord Chancellor said he should feel himself "very much inclined to adopt the idea he (the Master of the Rolls) pursued." p. 711. See Sugd. Pow. (8th ed.) 499–501; Prior, Lim. §§ 88, 89.

It has been discussed whether the doctrine of *cy pres* was applied in *Hopkins v. Hopkins*, West, 606; 1 Atk. 580; 1 Ves. Sr. 268; Co. Lit. 271 b, Butler's note (1739). See *Vanderplank v. King*, 3 Hare, 1, 12; Fearn, C. R. 206, Butler's

note; Prior, Lim. § 90; 1 Jarm. Wills (6th ed.) 294; Lewis, Perp. 429, note (3). See also *Chapman v. Brown*, 3 Burr. 1626.

⁶ By Lord Kenyon himself, *Brudenell v. Elwes*, 1 East, 442, 451. By Lord Eldon, s. c. 7 Ves. 382, 390. By Lord St. Leonards, *Stackpoole v. Stackpoole*, 4 Dr. & W. 320, 350. By Sir J. L. Knight Bruce, *Boughton v. James*, 1 Coll. 26, 44. By Sir James Wigram, *Vanderplank v. King*, 3 Hare, 1, 12. By Baron Rolfe, *Monypenny v. Dering*, 16 M. & W. 418, 432, 434. By Stirling, L. J., in *In re Mortimer*, [1905] 2 Ch. (C. A.) 502, 513. See Fearn, C. R. 208, Butler's note; Lewis, Perp. 453, 454.

⁷ *Griffith v. Harrison*, 4 T. R. 737, 748 (see s. c. 3 Bro. C. C. 410, 415; Fearn, C. R. 207, Butler's note; Sugd. Pow. (8th ed.) 499, 500). *Stackpoole v. Stackpoole*, 4 Dr. & W. 320, 350. *Vanderplank v. King*, 3 Hare, 1, 12, 16. *Line v. Hall*, 43 L. J. Ch. 107. *Peyton v. Lambert*, 8 Ir. C. L. 485. See *Robinson v. Hardcastle*, 2 Bro. C. C. 22, 344; 2 T. R. 241, 380, 781; *Parfitt v. Hember*, L. R. 4 Eq. 443; *Hampton v. Holman*, 5 Ch. D. 183, 190; Sugd. Pow. (8th ed.) 501; Lewis, Perp. Suppl. 146.

merely to executory trusts.¹ The statement to the contrary in *Mortimer v. West*² is not law.

§ 646. (2) The doctrine of *cy pres* is applied only in wills, not in deeds.³ Any new distinction between the construction of deeds and of wills is certainly to be deprecated at the present day; but the disposition of courts to confine the doctrine of *cy pres* within the narrowest limits, and the high authority of Lord Eldon as to the existence of this distinction, will probably cause it to be maintained.

§ 647. (3) A devise will not be construed *cy pres* when such construction might have the effect of passing the estate to persons to whom no interest is given in the will. Thus a devise to an unborn person for life, remainder to his first son in tail male, cannot be construed *cy pres* into an estate tail male for the unborn person, for under such construction his second and other sons would inherit.⁴ So if the remainder to the children of the unborn person is in fee, the unborn person cannot take a fee *cy pres*, for that would let in his collateral relations.⁵

¹ On a further point decided by *Pitt v. Jackson*, see § 649, *post*.

² 2 Sim. 274, 282, 283.

³ *Brudenell v. Elwes*, 1 East, 442, 451; 7 Ves. 382, 390. *Lewis, Perp.* 440. See *Stackpoole v. Stackpoole*, 4 Dr. & W. 320, 348; 2 Prest. Abs. 166. Cf. *Adams v. Adams*, Cowp. 651; Sugd. Pow. (8th ed.) 494, note (a), 502, 503; 3 Prop. Lawyer, 249. In the place last cited are printed the opinions of Sir John Scott, Sir John Mitford, Sir Samuel Romilly, and Mr. Hollist, taken when a reopening of the case of *Adams v. Adams* was mooted.

⁴ *Monypenny v. Dering*, 16 M. & W. 418; 2 De G. M. & G. 145. See *Griffith v. Harrison*, 4 T. R. 737, 748; *Seaward v. Willock*, 5 East, 198; *In re Rising*, [1904] 1

Ch. 533; *In re Mortimer*, [1905] 2 Ch. (C. A.) 502; 1 Jarm. Wills (6th ed.) 292.

If *Nicholl v. Nicholl*, 2 W. Bl. 1159, is to be considered as deciding the contrary, it must be held to be overruled. *Monypenny v. Dering*, 16 M. & W. 418, 434-436; 2 De G. M. & G. 145, 175. *In re Mortimer*, [1905] 2 Ch. (C. A.) 502, 512, 514. Prior, Lim. § 91. 1 Jarm. Wills (6th ed.) 293, note (h).

⁵ *Hale v. Pew*, 25 Beav. 335. *Wood v. Griffin*, 46 N. H. 230. Cf. *Bristow v. Warde*, 2 Ves. Jr. 336; *Lewis, Perp.* 430; 1 Jarm. Wills (6th ed.) 295.

In those of the United States, therefore, where estates tail are turned into estates in fee simple, the doctrine of *cy pres* can properly have no application. § 669, *post*.

And for a like reason the doctrine of *cy pres* cannot be applied to personalty.¹

St. Amour v. Rivard, 2 Mich. 294; § 665, *post*. But see Allyn v. Mather, 9 Conn. 114; §§ 662, 663, *post*; Gibson c. McNeely, 11 Ohio St. 131; §§ 666, 668, *post*.

¹ Routledge v. Dorril, 2 Ves. Jr. 357, 364, 365. Lewis, Perp. 435 *et seq.* Sugd. Pow. (8th ed.) 502. Tud. L. C. in Real Prop. (4th ed.) 615.

When personal property is given to an unborn person for life, remainder to his children and the heirs of their bodies (as, for instance, when a mixed fund of realty and personalty is given on such a limitation), the law is not entirely clear. Are we to say that if the subject of the gift was realty, the unborn person would take an estate tail, and that words which carry an estate tail in realty give an absolute interest in personalty; or are we to apply the words, as they stand, directly to the personalty? In the former case the unborn person will get an absolute interest, in the latter he will take a life interest and the gift over will be void. Sir J. L. Knight Bruce states the question without deciding it, although his inclination seems to be to favor the latter mode of treatment. Boughton v. James, 1 Coll. 26, 44. Mr. Prior, in his treatise on Limitations, § 96, seems inclined to the former. Mr. Lewis (Perp. 437-439) states the argument in favor of the former view, but leaves the reader uncertain as to his own opinion. The grounds of the decision in Mogg v. Mogg, 1 Mer. 654, which is sometimes re-

ferred to as favoring the former view, are too uncertain to make it of value as an authority. Prior, Lim. §§ 96, 314; Lewis, Perp. 431, 432, 438, 439.

The decision of the matter depends on the answer to be given to this question: "Is a legatee to take an absolute interest when such words are used as would, if used in a devise of realty, *give, as a matter of law*, an estate tail, or is a legatee to take an absolute interest only when such words are used as would, if used in a devise of realty, *show an intent to give* an estate tail." Thus if personalty is bequeathed to A. for life, remainder to the heirs of the body of A., is A. to take the absolute interest because, by the Rule in Shelley's Case, a devisee of realty would take the fee? Or is A. to have only a life estate, because that is all that the testator has intended that he shall take?

Unfortunately this general question is hard to answer; cases raising it have been usually, like that above given, where the Rule in Shelley's Case would govern a devise of realty. In a long series of cases a bequest of personalty to A. for life, remainder to the heirs of his body, has been held to pass an absolute interest; Theob. Wills (7th ed.) 477; Hawkins, Wills (2d ed.) 232; and probably this is a settled rule of construction which would not now be departed from; but the courts have of late indicated that such decisions are to be now followed only on the principle of *stare decisis*, and that where the language

§ 648. (4) A devise will not be construed *cy pres* when such construction would have the effect of excluding persons to whom an interest is given in the will. Thus if there is a devise to an unborn person for life, remainder to his sons successively in tail general, an estate tail male will not be given by *cy pres* to the unborn person, because that would exclude the daughters of his sons. This proposition is in accordance with the decisions and language of the courts in the cases referred to in the preceding section;¹ and the point has now been decided;² and indeed it seems not so objectionable to exclude some of a class, all of whom would be excluded except for the doctrine of *cy pres*, as to let in persons to whom nothing has been given.³

varies they will follow out the intention of the testator and not give an absolute interest in personalty, simply because an artificial rule, overthrowing the intention, would give an estate tail in realty. Thus in *Ex parte Wynch*, 5 De G. M. & G. 188, a bequest to A. for his life, remainder to his issue, was held to give A. a life interest only. Prior, Lim. §§ 301-316. Hawkins, Wills (2d ed.) 241. Wms. Pers. Prop. (17th ed.) 403. So a bequest to A. for life, and after his death to his heirs, was considered by Jessel, M. R., to give only a life interest. *Smith v. Butcher*, 10 Ch. D. 113. See 2 Jarm. Wills (6th ed.) 1193 *et seq.* A painstaking note on this point, where many cases are collected, will be found in 29 Lawyers' Rep. Annotated, n. s. 963. A better statement of the doctrines of law involved is in 4 Ill. Law Rev. 639.

According to this more modern and more reasonable view, a gift of personalty should be construed without regard to the effect that

the doctrine of *cy pres* would have upon a similar devise of realty.

¹ And see *Adams v. Adams*, Cowp. 651.

² *In re Rising*, [1904] 1 Ch. 533. And see *In re Richardson*, [1904] 1 Ch. 332, 341.

³ In *Line v. Hall*, decided in 1873, there was a power in A. to appoint to his children; he appointed to his son G. for life, with a remainder (1) (according to 43 L. J. Ch. 107) to G.'s first and other sons successively in tail, remainder to G.'s daughters * in tail; but (2) (according to [1873] W. N. 198) to the first and other sons of G. successively in tail male; but again (3) (according to 22 W. R. 124) to the first and other sons of G. successively in tail. Jessel, M. R., is declared in all the reports to have decided that G. took an estate tail by *cy pres*. This was correct according to statement (1). If the facts were as given in statement (2), G. would have taken an estate tail male. If statement (3) had been correct, the doctrine of

* The book says "daughter," but this is assumed to be a misprint.

§ 649. (5) An estate tail can be given by *cy pres* to an ancestor if all his issue are given by the devise vested interests in tail in the whole of the estate as purchasers, although they will not inherit from him in the same order in which the estate is devised to them as purchasers. Thus if an estate is given to an unborn person for life, remainder to his children as tenants in common in tail, with cross-remainders in tail, such person can take an estate tail by *cy pres*, for every descendant has the possibility, both under the devise as framed (apart, of course, from the question of remoteness), and as heir in tail of A., of taking the whole estate.¹ If in such case there were no cross-remainders, and consequently no chance for every child of the unborn person to take the whole estate, the doctrine of *cy pres* could not have been applied.

§ 650. (6) When estates for life are devised to a class, and the share of each member is given to his or her children in tail, and some of the members are born, and some are not, the doctrine of *cy pres* will be applied to the shares of the latter, although not to those of the former.²

cy pres could not have been applied. G. could not have taken an estate tail male, for that would have excluded his son's daughters (see the text); and he could not have taken an estate tail, for that would have included his daughters, see § 647, *ante*.

¹ *Pitt v. Jackson*, 2 Bro. C. C. 51. *Vanderplank v. King*, 3 Hare, 1. *Fearne*, C. R. 206, 207, *Butler's note*. 1 *Jarm. Wills* (6th ed.) 293. *Lewis*, *Perp.* 431.

² *Guy v. Guy*, 30 N. Z. 383. This seems to have been the effect of *Vanderplank v. King*, 3 Hare, 1, as construed by the Court. It is so understood by Mr. Marsden, *Perp.* 271, and in 1 *Jarm. Wills* (6th ed.) 293. But the case is confused by the learned Vice-Chancellor, Sir

James Wigram, who decided it, speaking of the gift to the grandchildren as being a gift to a single class, so that the share of each would remain undetermined until the whole class was closed. 3 Hare, 13-15. This would seem to indicate a gift to all the grandchildren *per capita*. On such a construction, the doctrine of *cy pres*, if applied at all, would have to be applied to the whole estate, for the shares of those grandchildren whose parents did not take estates tail could not be determined. This appears to have been the understanding by Mr. Lewis of the construction put upon the devise in *Vanderplank v. King*; and on this construction his criticism against the partial application of the doctrine of *cy pres*

§ 651. (7) The doctrine of *cy pres* is not to be extended.¹

§ 652. (8) When a series of successive life estates is devised to one and his issue forever, with cross-remainders, the first generation that is unborn at the testator's death takes an estate tail by *cy pres*. Thus, if an estate is devised to A. for life, remainder to his children as tenants in common for their respective lives, remainder, as to the share of each child, to its children as tenants in common for their lives, and so on, successive generations taking estates for life forever, with cross-remainders; and A. has two children, one B., born before, and another C., born after the testator's death, then B.'s children will take estates tail, and C. will take an estate tail. *Humberston v. Humberston*.² This was a case of an executory trust;³ but in *Parfitt v. Hember*,⁴ where it was considered that the testator had intended to create a series of life estates in perpetuity, Lord Romilly, M. R., by *cy pres* gave the unborn issue an estate tail,⁵ declaring that the doctrine was not confined

seems sound. Lewis, Perp. Suppl. 146-148. But on the whole the interpretation of the case given in the text is probably the correct one. 3 Hare, 17, 18. See Lewis, Perp. Suppl. 59.

See also *Humberston v. Humberston*, 1 P. Wms. 332. But cf. *Williams v. Teale*, 6 Hare, 239, 253. Lewis, Perp. 149-151.

¹ *Brudenell v. Elwes*, 1 East, 442, 451; 7 Ves. 382, 390. *Boughton v. James*, 1 Coll. 26, 44. *Hale v. Pew*, 25 Beav. 335, 338. See *Bristow v. Warde*, 2 Ves. Jr. 336; *Monypenny v. Dering*, 16 M. & W. 418, 428, 434; *In re Mortimer*, [1905] 2 Ch. (C. A.) 502, 505, 512, 513; *Dennehy's Estate*, 17 Ir. Ch. 97; Lewis, Perp. 453, 454; Suppl. 152; *Fearne, C. R.* 208, *Butler's note*; 1 Jarm. Wills (6th ed.) 289; § 645, *ante*.

² 1 P. Wms. 332; 2 Vern. 737; Prec. Ch. 455; Gilb. Eq. 128.

³ See *Mortimer v. West*, 2 Sim. 274, 282; 1 Jarm. Wills (6th ed.) 289; Lewis, Perp. 450.

⁴ L. R. 4 Eq. 443.

⁵ "When the Court finds that the object expressed by the testator is to give to A. an estate for life, to A.'s eldest son another estate for life, and so on, the Court will carry that intention into effect as nearly as it can, by giving to A. an estate for life, and to his eldest son, if unborn at the death of the testator, an estate in tail male, or, if he be alive at the death of the testator, an estate for life, with a remainder to his eldest son in tail male." L. R. 4 Eq. 446. It is conceived, however, that the doctrine of *cy pres* can be applied only when the intention is clear that all the issue

to executory trusts; and this declaration was approved in *Hampton v. Holman*.¹

§ 653. If the effect of applying the doctrine of *cy pres* might be to give an interest as heir in tail to a person to whom no estate for life is given, it will not be applied. Thus in *Seaward v. Willock*,² where there was a devise to A. and his issue for ten generations successively for life, although only the estate of A. was in question, it is conceived that his children could not have taken an estate tail by *cy pres*.³ So if the effect of applying the doctrine of *cy pres* is to exclude a person to whom a life estate is given, it will not be applied.⁴

§ 654. If the issue take successively leasehold estates determinable by death, the doctrine of *cy pres* will not be applied.⁵

§ 655. It has been sometimes supposed that when a series of life estates is given to A. and to successive generations of his issue, it is A. who takes the estate tail by *cy pres*, and not the first generation of unborn issue; but this, it is conceived, is erroneous, and contrary to the true principles which govern the doctrine of *cy pres*.⁶

§ 656. The difficulty has arisen from not distinguishing these cases from those in which an estate of inheritance is clearly given to A., but coupled with a provision that the tenants shall hold for life. A. in those cases takes an estate tail, not by *cy pres*, but by rejecting the words which are repugnant to an

are to take, and not merely the eldest in each generation. § 653, *post*. Probably the Master of the Rolls, in this somewhat carelessly put instance, had no intention of suggesting the contrary.

¹ 5 Ch. D. 183, 190, 191. See *In re Richardson*, [1904] 1 Ch. 332, 340; Lewis, *Perp.* 434, 435; Theob. Wills (7th ed.) 612; 1 Jarm. Wills (6th ed.) 290, note (t); 17 Harv. Law Rev. 559. Cf. *Manning v. Andrews*, 1 Leon. 256, 258.

² 5 East, 198.

³ See § 647, *ante*; Lewis, *Perp.* 433; Prior, *Lim.* § 87; Sugd. *Pow.* (8th ed.) 498, note; Fearn, *C. R.* 208, Butler's note; *Monypenny v. Dering*, 2 De G. M. & G. 145, 178.

⁴ *In re Rising*, [1904] 1 Ch. 533.

⁵ *Somerville v. Lethbridge*, 6 T. R. 213. *Beard v. Westcott*, 5 Taunt. 393; 5 B. & Ald. 801; T. & R. 25. Lewis, *Perp.* 441. Prior, *Lim.* § 92.

⁶ And see 1 Jarm. Wills (6th ed.) 289.

estate of inheritance.¹ So when the estate tail, although not expressly given, arises by implication.²

§ 657. In *Wollen v. Andrews*³ the first taker, a child, was given an estate tail, but this was because the life estates to the unborn grandchildren were held too remote, an error long since exploded;⁴ besides, in this case the child took an estate tail by implication, as pointed out by Best, C. J., without any aid from *cy pres*.⁵

§ 658. In *Forsbrook v. Forsbrook*⁶ the testatrix devised land to her nephews C. and T. during their lives, and after their death it was her will that their eldest sons should inherit the land during their lives, and so on, the eldest sons of the two families to inherit the land forever; each two of the succeed-

¹ *Doe d. Cotton v. Stenlake*, 12 East, 515. *Reece v. Steel*, 2 Sim. 233. *Hugo v. Williams*, L. R. 14 Eq. 224. 1 Jarm. Wills (6th ed.) 289. See *Monkhouse v. Monkhouse*, 3 Sim. 119; *Mackworth v. Hinxman*, 2 Keen, 658 (cf. *Ker v. Dungannon*, 1 Dr. & W. 509, 537, 538; Sugd. Law of Prop. 341, note); *Thompson v. Thompson*, 1 Coll. 381, 388; *Towns v. Wentworth*, 11 Moore, P. C. 526, 545; *Forsbrook v. Forsbrook*, L. R. 3 Ch. 93.

² *Mortimer v. West*, 2 Sim. 274 (in which the application of the doctrine of *cy pres* is expressly negatived. Pp. 282, 283). *Brooke v. Turner*, 2 Bing. N. C. 422 (see *Lewis, Perp.* 444-446). *Trash v. Wood*, 4 Myl. & Cr. 324 (see *Lewis, Perp.* 446, 447). *Prior, Lim.* §§ 86, 264. But see *Lewis, Perp.* 444, note. Cf. *Monypenny v. Dering*, 2 De G. M. & G. 145, 177-179.

Goodtitle d. Cross v. Woodhull, Willes, 592, did not call for any application of *cy pres* at all. It was simply an instance of the application of the Rule in *Shelley's Case*.

See *Lewis, Perp.* 447-450. Cf. *Prior, Lim.* § 86. So *In re Richardson*, [1904] 1 Ch. 332, raised no question of the application of *cy pres*. The point decided was that the first tenant for life (a living person) did not take an estate tail by implication, there being no gift over in default of issue.

³ 2 Bing. 126.

⁴ § 232, *ante*.

⁵ See *Lewis, Perp.* 442, 443. The treatment of the question when, on the one hand, the first taker is to have, either expressly or by implication, an estate tail, and when, on the other hand, unborn children are to take estates tail by *cy pres*, by Mr. Lewis, is not marked by his wonted clearness. It is confused by the mistaken theory — afterwards abandoned by him, *Suppl.* 27 *et seq.* — that the Rule against Perpetuities is to be applied to the state of things at the date of the will, and not at the time of the testator's death. *Lewis, Perp.* 441 *et seq.*

⁶ L. R. 3 Ch. 93.

ing inheritors to inherit it free from any incumbrance. A bill was brought to obtain the opinion of the Court whether the nephews C. and T. could commit waste. The Lords Justices decided that the nephews had only life estates in possession, and therefore could not commit waste. This was the point before them, but they also went on and declared that the nephews' life estates were followed by remainders to their eldest sons for life, remainder to themselves in tail.¹ The case was not argued nor decided on any *cy pres* ground. Indeed, Rolt, L. J., said: "I think that effect may be given to all the words of the will, without having recourse to the doctrine of *cy pres*." At the end, however, of his opinion, after saying that the nephews took life estates, remainder to their eldest sons for life, remainder to the nephews themselves in tail male, he added: "The same result would be arrived at if we held it to be a perpetual succession of life estates — which we might have done if it had not been for the direction respecting incumbrances — and then applied the doctrine of *cy pres*, which would give the nephews an estate in tail male."²

§ 659. The Lord Justice cannot have meant that by *cy pres* the nephews could have taken an estate tail in possession; for the "result" was that they took an estate for life in posses-

¹ This had been the contention on neither side. The counsel for the nephews urged that they had estates tail in possession; the counsel for the eldest sons of the nephews argued that their clients were entitled to estates tail in remainder. In *Hampton v. Holman*, 5 Ch. D. 183, 187, Sir George Jessel, M. R., speaking of *Forsbrook v. Forsbrook*, remarks that thus to go on and declare the rights of parties when immediate relief could not be given was against the settled law of the Court; that to decide that "there was an ultimate re-

mainder in tail in the tenant for life," "transgressed the well-established rule of the Court," and was "a mere slip."

² In 16 W. R. 290, 291, the only other place where the case seems to be reported, the language is: "A perpetual succession of life estates would have produced the same effect, and might be adopted as the true construction but for the words as to taking the property free from incumbrances, and then, by applying the doctrine of *cy pres*, you would arrive at the same result."

sion, remainder to their eldest sons for life, remainder to themselves in tail; and the real point in issue was that the nephews did not take an estate tail in possession, and therefore could not commit waste. Whatever the Lord Justice meant, he could not have meant that by *cy pres* the first of a series of life tenants can take an immediate estate tail.

§ 660. He probably used the term "*cy pres*," not as meaning a method of modifying a testator's intention when it comes in conflict with the Rule against Perpetuities (which is the meaning commonly attributed to it, and which it bears in this chapter), but as meaning a method of harmonizing two conflicting intentions. What he apparently meant was that when there are limitations to certain only of A.'s issue, and yet it is clear that the testator wishes the estate not to go over until A.'s issue is exhausted, A., to effectuate this, will be held to have an estate tail in remainder after the limitations to the particular issue.¹ This is the meaning attributed to him by Jessel, M. R., in *Hampton v. Holman*.²

§ 661. The American cases involving any question of *cy pres* are few. In *Wood v. Griffin*³ there was a devise to J. for life, remainder to J.'s children and the survivors of them for life, remainder to the grandchildren of J. in fee simple. It was held that the children of J. took only life estates. It was not suggested, apparently, that the doctrine of *cy pres*

¹ See *In re Rising*, [1904] 1 Ch. 533. Cf. *Doe d. Gallini v. Gallini*, 5 B. & Ad. 621; 3 A. & E. 340; 2 Jarm. Wills (6th ed.) 1978.

² 5 Ch. D. 183, 193, 194.

In 1 Jarm. Wills (5th ed.) 267, note (u), it is said that the *cy pres* doctrine "never has been applied so as to give an *immediate* estate tail to a person, born in the testator's lifetime, who by the will is expressly made devisee for life, with remainder to his (unborn) son for life. There is no reason why the

unborn son should not take the estate for life as it is given to him. If the ulterior gifts require an estate tail in the parent, it may be by way of remainder after the son's life estate, as suggested by Rolt, L. J., *Forsbrook v. Forsbrook*, L. R. 3 Ch. 99." But this estate tail is given to the parent because of "the ulterior gifts," not because of the doctrine of *cy pres*, as that term is commonly and technically used. See 1 Jarm. Wills (6th ed.) 259.

³ 46 N. H. 230.

could be applied; and it clearly could not, both because the grandchildren took fees simple,¹ and also because they seem to have taken *per capita*.²

§ 662. *Allyn v. Mather*.³ Here there was a devise to the testator's son for life, remainder to the testator's grandsons A. and B. during their lives, "and, after their decease, to each of the eldest sons; and so from eldest son or sons forever; and in case they should have none, to the eldest male child of any of my [the testator's] sons; and so from eldest to eldest to the end of time." A. had three sons, E., H., and R. E. died before A., leaving a daughter, M. H. had died before the testator, leaving sons and daughters. On the death of A., R. brought ejectment against M. Three judges thought that by "eldest son" of A. the testator meant the "eldest living at the death of A.," and consequently that R. was entitled to recover. Daggett, J., dissenting, held (*semble* correctly) that eldest meant "eldest born," and that consequently R. was not entitled. All that was necessary to decide was that R. was entitled to the seisin as tenant for life, but the judges who thought him entitled said that he took an estate tail by *cy pres*. This, on their construction, seems questionable, to say the least. If the eldest son of A. means the eldest surviving, the eldest son of such eldest son must mean the eldest surviving; consequently the expressions of the will exclude the eldest son of an eldest born son, if the latter has died before his father. That is, if R. should have had two sons, N. and O., and N. had died before R. leaving a son P., O. would take the estate on the death of R., and P. would be excluded. But if R. had an estate tail by *cy pres*, P. would take by descent. Consequently as an estate tail by *cy pres* would include persons whom the terms of the will did not include, it could not be applied.⁴

§ 663. Mr. Justice Daggett, who thought that the first-born son E. was entitled, was of opinion that he took an estate tail male by *cy pres*. There is more reason for this view, for

¹ § 647, *ante*.

² § 650, note, *ante*.

³ 9 Conn. 114.

⁴ § 647, *ante*.

it is a possible, although a very strained, construction to hold that all the issue male of E. were to take. But it is hard to see how *cy pres* can ever be properly applied in Connecticut; for by a statute in that State¹ "every estate, given in fee tail, shall be an absolute estate in fee simple, to the issue of the first donee in tail." Consequently any attempt to construe a devise *cy pres* lets in persons to whom nothing is given by the will.²

§ 664. *Jackson v. Brown.*³ Here there was a devise to A. for life, remainder to the first son of A. for life, remainder to the first and every other son and sons of such first son of A. successively in tail male. A. was unmarried at the testator's death. It was held that the eldest son of A. took an estate tail male by *cy pres*. This was an instance of the normal application of the doctrine.⁴

§ 665. *St. Amour v. Rivard.*⁵ A testator devised to his son L., "his life lasting, the use and benefit" of certain land, and made other like devises. He added: "It is well to be understood that all and every single disposal of real estate made in this my testament, is only for the use and benefit of him or her in whose favor it is made, his or her life lasting, and that it is my formal will that neither my real estate nor any parcel thereof, will ever be sold or alienated in whatsoever manner — but that after the decease of those several to which shares or parcels of my real estate have been assigned, the said shares or parcels will remain for the use and benefit of the descendants of him or her to whom a share has been assigned, their lives lasting, and so on, and in case of demise

¹ Rev. of 1875, tit. 18, c. 6, pt. 1, § 3, p. 352 (confirmatory, it is said of the common law of the State. *Wells v. Olcott*, Kirby, 118. *Chappel v. Brewster*, Id. 175. *Hamilton v. Hempsted*, 3 Day, 332).

² § 647, *ante*; §§ 665, 667, 669, *post*.

³ 13 Wend. 437.

⁴ The testator died in 1780, and the New York statute turning estates tail into fee simple was not passed till Feb. 23, 1786, so that the considerations arising under *Allyn v. Mather*, 9 Conn. 114, § 663, *ante*, are not applicable to this case.

⁵ 2 Mich. 294.

without posterity, the said share shall accrue to the use and benefit of the owner or of the owners being of my relation or descendants, their life lasting, of the next share or shares, and so long as any posterity will exist, and in case of extinction to the next heirs." The persons to whom these devises were made were the children and heirs at law of the testator, and they transferred all their interest to the plaintiff. The Court held that the plaintiff took the entire title to the estate, and consequently must have been of opinion that the children took the entire interest in the land.¹ The Court held that the doctrine of *cy pres* did not apply; and although the reasoning is not very clear, this ruling seems correct, for by statute in Michigan² "all estates tail are abolished and every estate which would be adjudged a fee tail" according to the law of Michigan before 1821 "shall for all purposes be adjudged a fee simple." To give the first issue of the children an estate in fee simple would let in persons to whom no interest was given by the will, and consequently the doctrine of *cy pres* could not be applied.³

§ 666. *Gibson v. McNeely*.⁴ A testator devised land to three persons, children of his deceased sister, for their lives, and at the death of any of the devisees who should have taken for life he gave his share to his issue, share and share alike, for their lives respectively; and again, at the death of the issue last aforesaid, or any of them, he devised the respective share of said issue to the issue of such issue or any of them, share and share alike, for their lives, "and in this manner,

¹ A possible construction, on which the decision can be sustained, is that there was a gift in tail to the children, enlarged by statute into a fee. See §§ 249 *a*, note 2, 656, *ante*. But whether the grandchildren did not take life estates with remainders to their parents in fee, *quære*. See *Fors-*

brook v. Forsbrook, L. R. 3 Ch. 93; §§ 658-660, *ante*.

² 2 Comp. Laws (1871), § 4070.

³ §§ 647, 663, *ante*; §§ 668, 669, *post*. The statement of *St. Amour v. Rivard*, contained in 2 Am. L. C. in Real Prop. 488, 489, is obscure.

⁴ 11 Ohio St. 131, affirming *s. c. sub nom. Gibson v. Moulton*, 2 Disney, 158.

down in entailment as far as may be allowed by the statute in such case made and provided." It was held that the issue of the children took estates tail. The attention of the Court was mainly directed to another question.

§ 667. In this case there appear to have been no cross remainders, and consequently persons might take by descent, under an estate tail to the issue, created by *cy pres*, an interest in the whole estate which was not given to them by the words of the will; and therefore, it would seem, the doctrine of *cy pres* ought not to have been applied.¹

§ 668. Again, by a statute of Ohio,² borrowed apparently from that of Connecticut,³ "all estates given in tail shall be and remain an absolute estate in fee simple, to the issue of the first donee in tail;" and therefore an estate tail given to the sister's grandchildren might go to persons to whom nothing was given by the will, and for this reason also the doctrine of *cy pres* ought not to have been applied.⁴

§ 669. In short, as the essence of the doctrine of *cy pres* consists in giving an estate tail, and as to give an estate in fee simple by *cy pres* violates the fundamental principle that you cannot by *cy pres* let in persons to whom the will gives nothing, it would seem as if the doctrine had no scope in America, save in those comparatively few jurisdictions — e. g. Maine, Massachusetts, Rhode Island, — where estates tail still exist.⁵

§ 670. In *Doe d. McDonnell v. McIsaac* ⁶ and *Ferguson v. Ferguson* ⁷ the term *cy pres* is used loosely.

¹ § 647, *ante*.

² St. 1811, c. 260; 2 Gen. Code (1910), § 8622.

³ § 663, *ante*.

⁴ §§ 647, 663, 665, *ante*; § 669, *post*. And see *Phillips v. Herron*, 55 Ohio St. 478.

⁵ §§ 647, 663, 665, 668, *ante*.

⁶ 1 Hasz. & Warb. 353, 360; Peters (P. E. I.) 236, 241.

⁷ 39 U. C. Q. B. 232. On appeal, 1 Ont. Ap. 452; 2 Can. S. C. 497.

CHAPTER XX.

ACCUMULATIONS.¹

§ 671. WHEN a settlor or testator directs income to be accumulated, and it is a condition precedent to the right of enjoying the income that the period fixed for the determination of accumulation should arrive, then, if this period may fall beyond the limits of the Rule against Perpetuities, the gift of the accumulated income is too remote. Thus, if there be a direction in a will to accumulate the income of property for fifty years, and at the end of the time pay the accumulated fund to those who shall then be the heirs of the testator, the gift is void, and those persons will be entitled to the property who would have been entitled to it had the direction to accumulate and the gift of the accumulated fund both been omitted from the will.² The gift of the accumulated fund is, as has been said, void; the direction to accumulate is also to be disregarded, and this can be done on either of two theories. It may be said that the trust to accumulate exists only for the sake of the gift of the accumulated fund, and as the gift is void, the trust to accumulate fails also; or the trust to accumulate may be regarded as still existing, but as, subject to this trust, the property is in the heir or next of kin or residuary devisee or legatee, this latter can at once put an end to the trust, as explained in the following section.

§ 672. If the person to whom the accumulated income is to be paid has a vested indefeasible right to the possession of

¹ See Scott's *Trusts for Accumulation*, printed at the end of an American edition (1888) of Lewin on *Trusts*.

² *Baker v. Stuart*, 28 Ont. 439. *Rogers's Estate*, 18 Phila. 99.

the principal or the accumulations, then the direction to accumulate is an illegal restraint on alienation, and such person can put an end to the accumulation at any time. Consequently such direction, being destructible by him at any time cannot be too remote;¹ and the result is the same, although such person is not in existence or ascertained at the date of the gift, if he must come into existence or be ascertained, if at all, and have a vested right to possession, within the limits of the Rule against Perpetuities.² This seems to be the ground on which the accumulation in *Otis v. Coffin*³ is to be sustained, although the objection of remoteness does not appear to have been raised in that case. In *Tregonwell v. Sydenham*⁴ a trust to accumulate which might last sixty years was held good, apparently because it might be terminated at any time by the heir, to whom the House of Lords held there was a resulting trust.⁵

§ 673. The tendency of the courts being to construe limitations as vested, the arrival of the period fixed for, or needed for, the accumulation will not be deemed a condition precedent to the gift of the accumulated fund, unless the language employed requires such a construction.⁶

§ 674. If the accumulation is a condition precedent, and the time of accumulation is or may be too long, the gift of the

¹ *Kimball v. Crocker*, 53 Me. 263. *Rogers's Estate*, 179 Pa. 602. *MacVean v. MacVean*, 24 Vict. L. R. 835. *Cain v. Watson*, [1910] Vict. L. R. 256, 272, 273. See Chap. IV., *ante*; § 692, *post*; 1 Jarm. Wills (6th ed.) 303; Gray, *Restraints on Alienation* (2d ed.), §§ 105 *et seq.*, 297-299. Cf. *In re Trevanion*, [1910] 2 Ch. 538. The doctrine peculiar to Massachusetts and Illinois that the enjoyment of a present vested equitable fee can be postponed, and accumulation accordingly permitted in the mean-

time, and the connection of this local doctrine with the Rule against Perpetuities is discussed, §§ 121 *c et seq.*, *ante*.

² *Phipps v. Kelynge*, 2 V. & B. 57, note. See *Southampton v. Hertford*, 2 V. & B. 54, 62, 63.

³ 7 Gray, 511.

⁴ 3 Dow, 194.

⁵ See §§ 414, 419-422, *ante*.

⁶ *Oddie v. Brown*, 4 De G. & J. 179; reversing s. c. 28 L. J. Ch. 542; 4 Jur. n. s. 605. See 4 Jur. n. s. pt. 2, 337; *In re Wood*, [1894] 2 Ch. 310, 316.

accumulated fund is bad altogether. The settlor or testator has said that the gift shall vest at a certain time or on a certain event. The courts cannot substitute a shorter time or a speedier event.¹

§ 675. Although certain persons or classes of persons will, within the limits of the Rule against Perpetuities, be entitled, by their joint action, to stop an accumulation and alienate the fund, yet the gift of the accumulated fund will be bad for remoteness, unless within those limits their relative rights are ascertained. Thus where rents were to be accumulated until the expiration of a leasehold interest in other land which had sixty years to run, and then so much of the accumulations as was necessary was to be spent in renewing the lease for the benefit of A., and the balance to be paid to B., it was held that the gift of the balance was too remote, although A. and B. together could at any time put an end to the accumulation.² This is an instance of the general principle discussed in Chapter VII., that present power to alienate is not the true test of the validity of a future limitation. Of course, where the interests of all parties are defined and vested, — e. g. to A. for life, remainder to B. in fee, — there a provision for accumulation is not obnoxious to the objection of remoteness.³

¹ *Southampton v. Hertford*, 2 V. & B. 54. *Marshall v. Holloway*, 2 Swanst. 432. *Vawdry v. Geddes*, 1 Russ. & M. 203. *Curtis v. Lukin*, 5 Beav. 147. *Boughton v. James*, 1 Coll. 26, 45; *sub nom.* *Boughton v. Boughton*, 1 H. L. C. 406. *Scarisbrick v. Skelmersdale*, 17 Sim. 187. *Turvin v. Newcome*, 3 K. & J. 16. *Andrews v. Lincoln*, 95 Me. 541. *Thorndike v. Loring*, 15 Gray, 391. *Gerber's Estate*, 196 Pa. 366. *Smith v. Cunninghame*, 13 L. R. Ir. 480. *Lewis*, Perp. 593-596; Suppl. 183 *et seq.* *Harg. Thel. Act*, § 74. 3 *Dav. Conv.* (3d ed.) 465, note. See *Crosse v. Glennie*, 2 Y.

& C. C. C. 237, 243; *Lewis*, Perp. Suppl. 190. On trusts for accumulation in connection with estates tail, see §§ 462 *et seq.*, *ante*.

A provision for accumulation, good at common law, but contrary to the Thellusson Act, will be sustained so far as it does not violate that Act. § 687, *post*.

² *Curtis v. Lukin*, 5 Beav. 147. See *Beaumont v. Sowter*, 19 S. Aust. 93.

³ *Phipps v. Kelynge*, 2 V. & B. 57, note, before Lord Camden, C., as explained by Sir William Grant in *Southampton v. Hertford*, 2 V. & B. 54, 62, 63.

§ 676. Income is sometimes directed to be accumulated for the payment of a testator's debts. This gives the creditors an immediate present charge on the property, and they can stop the accumulation at once. The direction to accumulate, being therefore destructible, is not void for remoteness.¹ So, when rents are to be accumulated to pay a legacy to a person in being.²

§ 676 *a*. When a testator directs that personal property and its accumulated income shall be invested in land, or that land and the accumulated rents be sold, and the proceeds invested in personalty, the courts allow the accumulation for only one year. Whether this rule be one of construction or of convenience, so called, may be doubtful, but it is well settled, and prevents such provisions raising any question of remoteness.³

§ 676 *b*. The Statute of 44 and 45 Vict. (1881), c. 41, § 42, allows accumulation during any period of minority.⁴

§ 677. It has been shown in the chapter on Charitable Trusts⁵ that when the happening of a remote event is a condition precedent to a gift for charity, the gift is void; so if there

¹ *Southampton v. Hertford*, 2 V. & B. 54, 65. *Bacon v. Proctor*, T. & R. 31. *Bateman v. Hotchkin*, 10 Beav. 426. See *Scarisbrick v. Skelmersdale*, 17 Sim. 187; § 467, *ante*; *Tewart v. Lawson*, L. R. 18 Eq. 490; *In re Heathcote*, [1904] 1 Ch. 826; see § 710, *post*; *Morgan v. Morgan*, 20 R. I. 600; 1 Jarm. Wills (6th ed.) 382. Cf. §§ 415–417, 486, *ante*; *Briggs v. Oxford*, 1 De G. M. & G. 363.

² *Williams v. Lewis*, 6 H. L. C. 1013. Cf. *In re Wise*, [1896] 1 Ch. 281; *Williams v. Herrick*, 19 R. I. 197.

³ *Sitwell v. Bernard*, 6 Ves. 520. *Entwistle v. Markland*, Id. 528, note. *Stuart v. Bruere*, Id. 529, note.

Griffith v. Morrison, 1 J. & W. 311, note. *Parry v. Warrington*, 6 Mad. 155. *Kilvington v. Gray*, 2 S. & S. 396. *Vickers v. Scott*, 3 M. & K. 500. *Vigor v. Harwood*, 12 Sim. 172. *Tucker v. Boswell*, 5 Beav. 607. See *Stair v. Macgill*, 1 Bligh, N. s. 662; *Greisley v. Chesterfield*, 13 Beav. 288; 1 Cooper, Cas. temp. Cottenham, 152 *et seq.*; Harg. Thel. Act, § 123; Lewin, Trusts (10th ed.) 324, 325.

⁴ On the Thellusson Act (St. 39 & 40 Geo. III, c. 98) and the Accumulations Act, 1892 (St. 55 & 56 Vict. c. 58), see App. B, §§ 686 *et seq.*, *post*.

⁵ § 605, *ante*.

is a direction to accumulate income for fifty years, and then, if a condition precedent has been complied with, pay the accumulated fund to a charity, the gift to the charity will be void, and the direction to accumulate void or destructible.¹

§ 678. But where there is an unconditional gift to charity, the gift will be regarded as immediate and good, although the particular mode of carrying out the charity which the donor has indicated is too remote.² Consequently in such a case if a direction for accumulation is invalid the only result is that the income is immediately distributable in charity; the heirs or next of kin are not let in.³

¹ *Russell v. Girard Trust Co.*, 171 Fed. Rep. 161; *sub nom.* *Girard Trust Co. v. Russell*, 179 Fed. Rep. 446. See *Chamberlayne v. Brockett*, L. R. 8 Ch. 206; *Rogers's Estate*, 18 Phila. 99.

² § 607, *ante*.

³ *Duggan v. Slocum*, 92 Fed. Rep. 806. *Handley v. Palmer*, 103 Fed. Rep. 39. *Brigham v. Brigham Hospital*, 126 Fed. Rep. 796; 134 Fed. Rep. 513. *Martin v. Margham*, 14 Sim. 230. *Odell v. Odell*, 10 Allen, 1. *Dexter v. Harvard College*, 176 Mass. 192. *Codman v. Brigham*, 187 Mass. 309. *Woodruff v. Marsh*, 63 Conn. 125, 137. *Philadelphia v. Girard*, 45 Pa. 9. *Curran v. Philadelphia Trust Co.*, 15 Phila. 84; s. c. *sub nom.* *Curran's Appeal*, 4 Pennyp. 331. *Franklin's Estate*, 27 W. N. C. (Pa.) 545. *Ingraham v. Ingraham*, 169 Ill. 432. See *A. G. v. Poulden*, 3 Hare, 555; *In re Swain*, [1905] 1 Ch. (C. A.) 669; *Brooks v. Belfast*, 90 Me. 318, 324; *American Academy v. Harvard College*, 12 Gray, 582; *Tainter v. Clark*, 5 Allen, 66; *Grimke v. A. G.*, 206 Mass. 49; *Williams v. Williams*, 8

N. Y. 525, 538; *Levy v. Levy*, 40 Barb. 585, 618, 626; 33 N. Y. 97; *Smith's Estate*, 18 Pa. C. C. 209. Cf. *A. G. v. Butler*, 123 Mass. 304; *Wilson v. Lynt*, 30 Barb. 124; *Shillington v. Portadown Council*, [1911] 1 I. R. 247; *Parkhurst v. Roy*, 7 Ont. Ap. 614; *Ogilvie v. Kirk Session of Dundee*, 8 Dunlop, C. of Sess. 1229; *Maxwell v. Maxwell*, 5 Rettie, C. of Sess. 248.

In *Ewen v. Bannerman*, 2 Dow & Cl. 74; *sub nom.* *Ewen v. Magistrates of Montrose*, 4 Wils. & Sh. 346, a gift of property to accumulate until it should amount to pounds, and then to be employed in erecting and maintaining a hospital for the support and education of boys, was held bad. This case could be supported, according to the English law, only on the view (probably incorrect) that the gift was conditional on the sum reaching a certain amount. See the case commented on and plainly disapproved by Lords Chelmsford and Wensleydale in *Magistrates of Dundee v. Morris*, 3 Macq. 134, 144, 174.

In *Hillyard v. Miller*, 10 Pa. 326, there was a devise in trust

§ 679. Whether when there is an immediate gift to a charity a direction to accumulate the income is void, as an unlawful restraint on the use of property, is not entirely clear. In *Harbin v. Masterman*¹ Sir John Wickens, V. C., held that such direction was not in itself void in the case of a charity, and his decision was followed in *Biddle's Appeal*.² Certainly the reasons for not allowing restraints on indefeasible interests vested in individuals³ do not apply so strongly to charities; but as no one is interested in raising the question adversely to the charity,⁴ the point is not likely often to come up. If the purpose of the trust cannot be carried out without accumulation for too long a period, the fund may be applied *cy pres*.⁵

§ 679 *a*. The House of Lords, affirming a decision of the Court of Appeal, which affirmed a decision of Stirling, J., has now held that all directions for accumulating the income of property given for charitable purposes are void as illegal restraints upon the use of property.⁶ The Supreme Judicial

to let out the income to deserving young farmers and mechanics, by investing it in bond and mortgage on their farms and houses, and "should it so happen in the lapse of time, that the income of said estate-fund should accumulate beyond the application for such loans," then to apply the income to build an asylum. The Court held that the trust to lend money to farmers and mechanics was not a charity, that the trust for accumulation was void, and that the devise failed. Assuming that they were right in holding that the trust for lending was not a charity, it followed that there was not an immediate gift to a charity, but only a gift which might take effect at a remote period, and consequently that the gift to the asylum and the trust to accumulate were invalid. *Hillyard v. Miller* is ex-

plained in *Philadelphia v. Girard*, 45 Pa. 9, 28, 29; and *Curran v. Philadelphia Trust Co.*, 15 Phila. 84; s. c. *sub nom.* *Curran's Appeal*, 4 Pennyp. 331. See *Odell v. Odell*, 10 Allen, 1, 12; and cf. *Witman v. Lex*, 17 S. & R. 88, 91.

¹ L. R. 12 Eq. 559.

² 99 Pa. 525, reversing s. c. *sub nom.* *Derbyshire's Estate*, 11 W. N. C. (Pa.) 22.

³ See Chap. IV., *ante*.

⁴ § 678, *ante*.

⁵ *Martin v. Margham*, 14 Sim. 230; and see *Hawes Place Congregational Soc. v. Trustees of Hawes Fund*, 5 Cush. 454; *Odell v. Odell*, 10 Allen, 1; *Harbin v. Masterman*, L. R. 12 Eq. 559, 565. Cf. *Ogilvie v. Kirk Session of Dundee*, 8 Dunlop, C. of Sess. 1229; *Maxwell v. Maxwell*, 5 Rettie, C. of Sess. 248.

⁶ *Harbin v. Masterman*, [1894] 2 Ch. (C. A.) 184; s. c. on appeal,

Court of Massachusetts¹ has held that "the limits of an accumulation for the benefit of a charity are subject to the order of a court of equity." The Supreme Court of Errors of Connecticut has reached the same result.² The doctrine of the House of Lords seems the better. The trustees of a charity are not bound to spend the income of the charity every year;³ they can lay by money for an ulterior purpose just as an individual can. The objection to allowing a charitable fund to accumulate is an objection of public policy, and it would seem better that the matter should be fixed by a positive rule of law than left to the discretion of judges. The discretion which chancellors exercise is a discretion in arranging the claims of one individual against another, not in settling limits to the operation of rules of public policy. It is a novel head of equity.⁴

sub nom. Wharton v. Masterman, [1895] A. C. 186. See Trustees Co. v. Bush, 28 N. Z. L. R. 117.

¹ St. Paul's Church v. A. G., 164 Mass. 188, 203, 204. Ripley v. Brown, 218 Mass. 33.

² Woodruff v. Marsh, 63 Conn.

125, 137, 138. See also Harper v. Deposit Co., 11 Ohio Dec. 240.

³ See Kinsey v. Kinsey, 26 Ont. 99, 101; Lindsay's Trustees, [1911] Session Cases, 584.

⁴ See the Pennsylvania St. of April 26, 1855, c. 12, § 715, *post*.

APPENDIX.

APPENDIX.

A.

CHARITIES FOR DEFINITE PERSONS.

680. It has often been said that a charitable trust must be for an indefinite number of persons.¹ Undoubtedly in most cases there is no defined person who has any rights under a charity. But there seem to be some cases in which the number of those persons who are the objects of a trust is either so extended or so limited that they form a definite class which must be considered as having rights, and yet the trust is deemed charitable.

§ 681. Thus a gift to the minister of a church forever is good.² So to a schoolmaster.³ So, perhaps, for a lodge of freemasons.⁴

§ 682. So a grant of land for those inhabitants of a village who could keep three cows, to pasture there part of the year, and, for the rest of the year, for all the inhabitants of the village to pasture, was held a good charitable trust.⁵ And a grant to all the free inhabitants of ancient tenements in a borough to take oysters at a certain season was held, in a much-considered case, to be a good charitable

¹ Jackson *v.* Phillips, 14 Allen, 539, 556. Russell *v.* Allen, 107 U. S. 163, 167. 2 Kent, Com. 288, note (a). On trusts non-charitable with indefinite *cestuis que trust* or no *cestuis que trust* at all, see App. H, §§ 894 *et seq.*, *post*.

² A. G. *v.* Cock, 2 Ves. Sr. 273. A. G. *v.* Goddard, T. & R. 348. A. G. *v.* Dublin, 38 N. H. 459.

³ See Cheeseman *v.* Partridge, 1 Atk. 436.

⁴ King *v.* Parker, 9 Cush. 71. See Anon., 3 Atk. 277; Vander Volgen *v.* Yates, 3 Barb. Ch. 242; 9 N. Y. 219, 221, 227. But not "for the benefit of individuals who have been engaged in the Oporto Red or Port St. Mary's White Sherry Wine Trade." *In re Gasiot*, 70 L. J. Ch. 242.

⁵ Wright *v.* Hobert, 9 Mod. 64.

trust.¹ And a gift for a school to be open to all the children of the neighborhood is a charity.²

§ 683. So a gift to poor relations, if it is to continue, is a charity;³ and yet the number of poor relations may be reduced to one or two, and it seems impossible to say that such one or two would not have a right to relief.⁴

§ 684. So directions that founder's kin or descendants should be

¹ *Saltash v. Goodman*, 5 C. P. D. 431; 7 Q. B. D. 106; *sub nom.* *Goodman v. Saltash*, 7 Ap. Cas. 633; §§ 582, 583, *ante*. See *In re Church Inclosure Act*, 35 Ch. D. 355, 369 *et seq.*; 38 Ch. D. 520, 530 *et seq.*; *In re St. Stephen*, 39 Ch. D. 492, 500, 501; *In re Norwich Town Close Estate Charity*, 40 Ch. D. 298, 301, 306.

² *Wright v. Linn*, 9 Pa. 433.

³ If an immediate distribution is directed, a gift to poor relations is not a charity, and the distribution is confined to the testator's next of kin. *Carr v. Bedford*, 2 Ch. Rep. 146. *Griffith v. Jones*, Id. 394. *Edge v. Salisbury*, Amb. 70. *Brunsdon v. Woolredge*, Id. 507. *Widmore v. Woodroffe*, Id. 636. *Gooding v. Gooding*, 1 Ves. Sr. 231. *Green v. Howard*, 1 Bro. C. C. 31. *Mahon v. Savage*, 1 Sch. & L. 111. *Bronson v. Strouse*, 57 Conn. 147. *M'Neilledge v. Galbraith*, 8 S. & R. 43. *Same v. Barclay*, 11 S. & R. 103. See *Liley v. Hey*, 1 Hare, 580; *Thomas v. Howell*, L. R. 18 Eq. 198; *Smith v. Harrington*, 4 Allen, 566; *Ingraham v. Ingraham*, 169 Ill. 432; *Sugd. Pow.* (8th ed.) 652 *et seq.* It has sometimes been held that in such a gift the word "poor" is to be rejected. *A. G. v. Buckland*, cited Amb. 71 (but see note *ad loc.*). *Widmore v. Woodroffe*, *ubi*

sup. (but here there was only one next of kin). *M'Neilledge v. Galbraith and Same v. Barclay*, *ubi sup.* *Fontaine v. Thompson*, 80 Va. 229. But the better opinion is that the next of kin must also be poor, to entitle them to take. *Carr v. Bedford*; *Brunsdon v. Woolredge*; *Green v. Howard*; *Mahon v. Savage*; *Bronson v. Strouse*, *ubi sup.* *Lewin, Trusts* (10th ed.) 1021, note. 2 *Jarm. Wills* (6th ed.) 1634. See *A. G. v. Northumberland*, 7 Ch. D. 745; *Bull v. Bull*, 8 Conn. 47.

* Where the gift to poor relations is charitable, the choice is not confined to the next of kin. *Isaac v. Defriez*, Amb. 595 (2d ed.), *semble* (see 17 Ves. 373). *A. G. v. Bucknall*, 2 Atk. 328. *White v. White*, 7 Ves. 423, *semble*. *A. G. v. Price*, 17 Ves. 371. *Gillam v. Taylor*, L. R. 16 Eq. 581. (Cf. *A. G. v. Northumberland*, 7 Ch. D. 745.) *Gafney v. Kenison*, 64 N. H. 354. *Webster v. Morris*, 66 Wis. 366, 392, 393. See *Bernal v. Bernal*, 3 Myl. & Cr. 559; *Waldo v. Caley*, 16 Ves. 206; *Swasey v. Am. Bible Soc.*, 57 Me. 523. But the beneficiaries must be absolutely, not relatively, poor. *A. G. v. Northumberland*, L. R. 7 Ch. D. 745. It is doubtful whether in Massachusetts a devise to poor relations is a good charitable gift.

preferred are very frequent in charities and have been held to be good.¹

§ 685. Certainly where the class intended to be benefited is so limited that one can say, "A. must take under this gift if any one does;" as in a gift for the minister of a church or for a schoolmaster,² it can hardly be said that A. has no rights.³ So when a charity is for all the inhabitants,⁴ one becoming an inhabitant has a right to enjoy the charity, which right accrues when he becomes an inhabitant; and so, again, a sole poor relation has a right in the income of a charitable trust for poor relations.⁵ There are therefore some trusts which are charitable, and yet have definite *cestuis que trust*.⁶

¹ Perin v. Carey, 24 How. 465, 507. Franklin v. Armfield, 2 Sneed, 305, 351. Dexter v. Harvard College, 176 Mass. 192. See Flood's Case, Hob. 136; Spencer v. All Souls College, Wilmot, 163; A. G. v. Sidney Sussex College, 34 Beav. 654; L. R. 4 Ch. 722; Darcy v. Kelley, 153 Mass. 433; Laverty v. Laverty, [1907] 1 I. R. 9.

² § 681, *ante*.

³ See A. G. v. Smart, 1 Ves. Sr. 72.

⁴ § 682, *ante*.

⁵ § 683, *ante*.

⁶ *The Attorney General is a necessary party to a suit to carry out a charitable trust.* Although, as is shown in the text, a charitable trust has sometimes definite *cestuis que trust*, yet the Attorney General is always a necessary party to a suit in equity to enforce a charitable trust. Cf. *In re Faraker*, [1912] 2 Ch. (C. A.) 488, 492.

In the sixteenth century the intervention of the Attorney General seems to have been considered unnecessary. See cases collected in Dwight's Charity Cases, 4, 14, 26, 65, 77, 181-203, 225-229; *Elmer v. Scot*, Choice Cas. in Ch. 155 (1582).

In proceedings before Commissioners under the Statute of Charitable Uses (43 Eliz. c. 4), the Attorney General did not appear, *Wright v. Hobert*, 9 Mod. 64; and indeed there seem to have been no parties properly so called. See *Duke, Charitable Uses, passim*. But proceedings under this statute have become obsolete in England (see *Tud. Char.* (3d ed.) 446); and were never taken in the United States.

When there is a suit between a trustee for charitable trusts and a person claiming adversely to the trusts, in which there is no question how the funds shall be applied in charity, the Attorney General need not be a party. See *Monill v. Lawson*, 4 Vin. Ab. 500; *A. G. v. Whorwood*, 1 Ves. Sr. 534; *Chitty v. Parker*, 4 Bro. C. C. 38; *A. G. v. Warren*, 2 Swanst. 291; *Ware v. Cumberlege*, 20 Beav. 503, 510 *et seq.*; *A. G. v. Clark*, 167 Mass. 201; *Wilberforce Educational Institute v. Holden*, 17 Ont. 439.

But to all suits in equity brought to carry out the provisions of a charitable trust in behalf of the class or persons intended to be benefited the Attorney General

B.

THE THELLUSSON ACT.¹

§ 686. Peter Thellusson, who died in 1797, devised his property to trustees to accumulate the income during the lives of all his sons,

must be a party. See *Wellbeloved v. Jones*, 1 S. & St. 40; *Sons of the Clergy v. Mose*, 9 Sim. 610; *A. G. v. Magdalen College*, 18 Beav. 223, 241 *et seq.*; *A. G. v. Mayor of Galway*, 1 Molloy, 95, 97, note; *Strickland v. Weldon*, 28 Ch. D. 426.

When there are definite trustees of a charitable trust, they may bring a bill to administer a charity, but the Attorney General must be joined as a defendant. *Mayor v. Nixon*, 2 Y. & J. 60. *Christ's Hospital v. A. G.*, 5 Hare, 257. *Harvard College v. Soc. for Promoting Theological Education*, 3 Gray, 280. The case of *Davis v. Jenkins*, 3 V. & B. 151, was, *semble*, not that of a charity.

And the Attorney General is no less a necessary party to a suit to enforce a charitable trust because there may be definite *cestuis que trust*, e. g., a charitable trust for poor relations. *Isaac v. Defriez*, Amb. 595. *A. G. v. Bucknall*, 2 Atk. 328. *A. G. v. Price*, 17 Ves. 371. *Gillam v. Taylor*, L. R. 16 Eq. 581. *A. G. v. Northumberland*, 7 Ch. D. 745. But cf. *A. G. v. Clark*, 167 Mass. 201, 204.

The Attorney General has the control of an information brought by him. The relator is joined only that there may be some one responsible for costs, and he need have no interest in the suit. See *Waller v. Hanger*, 2 Bulst. 134; *Anon.*, Sel. Cas. in Ch. 69; *A. G. v. Bucknall*, 2 Atk. 328; *Ludlow v. Greenhouse*, 1 Bligh, n. s. 17, 43-52; *A. G. v. Mayor of Dublin*, Id. 312, 351; *Re Bedford Charity*, 2 Swanst. 470, 520; *A. G. v. Green*, 1 J. & W. 303, 305; *A. G. v. Fellows*, Id. 254; *A. G. v. Dove, T. & R.* 328; *A. G. v. Vivian*, 1 Russ. 226, 235-237; *A. G. v. Carlisle*, 4 Sim. 275; *A. G. v. Plumtree*, 5 Mad. 452; *A. G. v. Ironmongers' Co.*, 2 Beav. 313, 328-332; 2 Myl. & K. 576, 578; *A. G. v. Barker*, 4 Myl. & Cr. 262; *Shore v. Wilson*, 9 Cl. & F. 355, 475; *A. G. v. Newark*, 1 Hare, 395, 399; *A. G. v. Clapham*, 10 Hare, App. lxviii.; *A. G. v. Brettingham*, 3 Beav. 91, 95; *A. G. v. Wright*, Id. 447; *A. G. v. Haberdashers' Co.*, 15 Beav. 397; *A. G. v. Wyggeston's Hospital*, 16 Beav. 313, 314, note; *A. G. v. Magdalen College*, 18 Beav. 223; *A. G. v. Sherborne Grammar*

¹ The provisions of the Thellusson Act have been partially adopted in Pennsylvania and in Alabama. The law in those States on the subject of accumulation is considered at the end of this Ap-

pendix B, §§ 715-726, *post*. The provisions on accumulation in the New York statutory system, and in those States which have copied the New York system, are given in Appendix C.

grandsons, and grandsons' children who were living at his death, and then, at the death of the survivor, to transfer the property in

School, Id. 256, 264; *A. G. v. St. Cross Hospital*, Id. 475; *A. G. v. Boucherett*, 25 Beav. 116, 121; *A. G. v. Butler*, 123 Mass. 304, 309; 1 Swanst. 305, note. Cf. *A. G. v. Heath*, Prec. Ch. 13.

Since the death of Queen Elizabeth (1603) there seem to have been but two cases in which a suit has been brought involving a charitable trust without the intervention of the Attorney General. They are:—

(1) *West v. Knight*, 1 Ch. Cas. 134 (1669). In this case P. had given by will £50 to the Parish of C. The minister, churchwardens, and overseers for the poor brought a bill against P.'s executrix, suggesting that he intended it for the benefit of the poor. It was contended by the executrix that any relief must be by Commission of Charitable Uses, and not by bill; but the Court sustained the bill. See Sir John Romilly's remarks on this case in *A. G. v. Magdalen College*, 18 Beav. 223, 249, 253.

(2) *Bernal v. Bernal*, 3 Myl. & Cr. 559. A fund was established by a testator for poor relations. In a suit to determine who were entitled, the Attorney General was not a party. No question was made as to his absence, and no dispute as to the validity of the legacy. It would seem clear, either that the legacy was a charity, and the Attorney General should have been made a party, or, if not a charity, it could be sustained only on the ground that it was valid by the law of Holland, where the testator was domi-

ciled. Considered as a legacy not charitable, and to be governed by English law, it was certainly too remote.

The case of *Saltash v. Goodman*, 5 C. P. D. 431; 7 Q. B. D. 106; *sub nom. Goodman v. Saltash*, 7 Ap. Cas. 633, has been stated, §§ 582, 583, *ante*. The ground on which it was put by the House of Lords was that the plaintiffs held a fishery, subject to the charitable trust of allowing the class to which the defendants belonged to take fish at certain times of the year. If the defendants had wished to enforce their claim, it would seem as if the suit must have been brought as an information by the Attorney General. (See *A. G. v. Heelis*, 2 S. & St. 67, 76 *et seq.*; *A. G. v. Carlisle*, 2 Sim. 437. The case of *Wright v. Hobert*, 9 Mod. 64, was before Commissioners.) But the suit was an action of trespass against the defendants, and to such a suit the Attorney General would not seem to be a necessary party.

Kurtz v. Beatty, 2 Cr. C. C. 699, *sub nom. Beatty v. Kurtz*, 2 Pet. 566, was mentioned in the first edition as a suit to enforce a charitable trust brought without joining the Attorney General. But, in truth, it was not a suit to enforce a charitable trust. The requirements of the Statute of Frauds preventing the transaction from creating a trust, it was considered to have amounted to the dedication of a burying-ground. See *Hopkins v. Grimshaw*, 165 U. S. 342, 352. In England only highways can be

three lots to the then living eldest male descendants of his three sons. The validity of this will was sustained by the courts,¹ but it led to the passing, in 1800, of the Statute 39 & 40 Geo. III., c. 98, commonly known as the *Thellusson Act*.² This act is given in full in a note.³ The history of the *Thellusson* litigation is told in the first

dedicated, but in several of the United States the courts, following the lead of *Beatty v. Kurtz*, have allowed dedication for other purposes; e. g. public squares, as in *Cincinnati v. White*, 6 Pet. 431; wharves, as in *Godfrey v. Alton*, 12 Ill. 29; schools, as in *Klinkener v. M'Keesport*, 11 Pa. 444; burying-grounds, as in *Hunter v. Trustees of Sandy Hill*, 6 Hill, 470; *Pierce v. Spafford*, 53 Vt. 394.

¹ *Thellusson v. Woodford*, 4 Ves. 227; 11 Ves. 112, §§ 216, 217, *ante*.

² The Statute is sometimes called Lord Loughborough's Act. See *Edwards v. Tuck*, 3 De G. M. & G. 40, 55.

³ "An Act to restrain all Trusts and Directions in Deeds or Wills, whereby the Profits or Produce of Real or Personal Estate shall be accumulated, and the beneficial Enjoyment thereof postponed beyond the Time therein limited.

"I. Whereas it is expedient that all dispositions of real or personal estates whereby the profits and produce thereof are directed to be accumulated, and the beneficial enjoyment thereof is postponed, should be made subject to the restrictions hereinafter contained; may it therefore please your Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in Parliament assembled,

and by the authority of the same, That no person or persons shall, after the passing of this Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues, profits or produce thereof shall be wholly or partially accumulated; for any longer term than the life or lives of any such grantor or grantors, settler or settlers; or the term of twenty-one years from the death of any such grantor, settler, deviser or testator; or during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mere* at the time of the death of such grantor, deviser or testator; or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the pro-

chapter of Hargrave's Treatise on the Thellusson Act.¹ The clumsy drafting of the Act has been often remarked on.²

§ 687. A provision for accumulation which violates the Rule against Perpetuities is wholly void;³ but a provision which is good so far as the Rule against Perpetuities is concerned, but violates the Thellusson Act, is void only for the excess. Thus, if there be a

visions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed.

"II. Provided always, and be it enacted, That nothing in this Act contained shall extend to any provision for payment of debts of any grantor, settler or deviser, or other person or persons, or to any provision for raising portions for any child or children of any grantor, settler or deviser, or any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this Act had not passed.

"III. Provided also, and be it enacted, That nothing in this Act contained shall extend to any disposition respecting heritable property within that part of Great Britain called Scotland.

"IV. Provided also, and be it enacted, That the restrictions in this Act contained shall take effect and be in force with respect to wills and testaments made and executed before the passing of this Act, in such cases only where the deviser or testator shall be living, and of sound and disposing mind, after the expiration of twelve calendar

months from the passing of this Act."

The St. 55 & 56 Vict. c. 58, cited as the Accumulations Act, 1892, added the following provision to the Thellusson Act: "No person shall, after the passing of this act, settle or dispose of any property in such manner that the rents, issues, profits, or income thereof shall be wholly or partially accumulated for the purchase of land only, for any longer period than during the minority or respective minorities of any person or persons who under the uses and trusts of the instrument directing such accumulation would, for the time being, if of full age, be entitled to receive the rents, issues, profits, or income so directed to be accumulated." See *In re Clutterbuck*, [1901] 2 Ch. 285; *In re Llanover*, [1903] 2 Ch. 330.

¹ See also 4 Ves. (Sumner's Ed.) 227, note.

² *Thellusson v. Woodford*, 11 Ves. 112, 148. *Bridgnorth v. Colins*, 15 Sim. 538, 541. *Shaw v. Rhodes*, 1 Myl. & Cr. 135, 141. *Ellis v. Maxwell*, 3 Beav. 587, 596. *Barrington v. Liddell*, 2 De G. M. & G. 480, 497. *Edwards v. Tuck*, 3 De G. M. & G. 40, 55. *Tench v. Cheese*, 6 De G. M. & G. 453, 460 (see, however, s. c. 19 Beav. 3, 26). *Harg. Thel. Act*, § 19.

³ § 674, *ante*.

direction in a will to accumulate income during the life of A., it can be accumulated for twenty-one years from the testator's death.¹

§ 688. But the Thellusson Act does not render valid, *pro tanto*, a provision for accumulation which violates the Rule against Perpetuities; such provision is bad altogether.²

§ 689. Sometimes a direction to accumulate is made by implication, although not directly. Thus while upon an executory devise of realty the intermediate income belongs to the heir, upon many executory bequests of personalty, for instance, executory bequests of residue, the intermediate income is accumulated and goes with the principal. Suppose, then, the event upon which such an executory bequest of personalty is to take effect is within the limits prescribed by the Rule against Perpetuities, but beyond those fixed by the Thellusson Act, what is to be done with the income beyond the time fixed by the Thellusson Act? Does the Act apply to it, or can it be accumulated for the benefit of the person to whom the executory bequest is made?

§ 690. Sir Lancelot Shadwell, V. C., ruled that the Act did not apply unless the direction to accumulate was express;³ and his decision was approved by Stuart, V. C.,⁴ and Romilly, M. R.⁵ But the great weight of authority, as of reason, is the other way.⁶

¹ Griffiths v. Vere, 9 Ves. 127. Longdon v. Simson, 12 Ves. 295. Crawley v. Crawley, 7 Sim. 427. O'Neill v. Lucas, 2 Keen, 313. M'Donald v. Bryce, Id. 276. Eyre v. Marsden, Id. 564, 572; 4 Myl. & Cr. 231. Shaw v. Rhodes, 1 Myl. & Cr. 135; *sub nom.* Evans v. Hellier, 5 Cl. & F. 114. Ellis v. Maxwell, 3 Beav. 587; 12 Beav. 104. Elborne v. Goode, 14 Sim. 165. Rosslyn's Trust, 16 Sim. 391. Oddie v. Brown, 4 De G. & J. 179. Bective v. Hodgson, 10 H. L. C. 656, 664, 671. Weatherall v. Thornburgh, 6 Ch. D. 261. Fonseca v. Jones, 21 Manitoba, 168, 184. Harrison v. Harrison, 7 Ont. L. R. 297. Harg. Thel. Act, §§ 111 *et seq.* Marsden, Perp. 323,

324. See Leake v. Robinson, 2 Mer. 363, 389, 390.

² Marshall v. Holloway, 2 Swanst. 432, 450. Curtis v. Lukin, 5 Beav. 147. Browne v. Stoughton, 14 Sim. 369. Boughton v. James, 1 Coll. 26, 45; *sub nom.* Boughton v. Boughton, 1 H. L. C. 406. Scarisbrick v. Skelmersdale, 17 Sim. 187. Turvin v. Newcome, 3 K. & J. 16. Baker v. Stuart, 28 Ont. 439. Harg. Thel. Act, §§ 74 *et seq.*

³ Elborne v. Goode, 14 Sim. 165. Bridgnorth v. Collins, 15 Sim. 538.

⁴ Matthews v. Keble, L. R. 4 Eq. 467.

⁵ Tench v. Cheese, 19 Beav. 3.

⁶ M'Donald v. Bryce, 2 Keen,

§ 691. The decisions of Sir Lancelot Shadwell seem to have been based on the mistaken analogy of infancy. The fact that at the end of a period of accumulation the person entitled to the property may be an infant, and that, therefore, the income may have to be accumulated longer, is no objection to the prior accumulation. This further accumulation is not a consequence of any act of the settlor or testator; he could not give authority to the infant to deal with the property, if he would.¹ But this furnishes no justification for Shadwell, V. C.'s, decisions. In cases like those before him, the provisions for accumulation are entirely in the control of the testator; the testator could prevent the income going with the principal if he saw fit, and the implied direction is as much his act as an express direction would be.²

§ 692. If the person to whom the accumulations are to be paid has a vested indefeasible right to the possession of the principal, then the direction to accumulate is an illegal restraint on alienation, and such person can put an end to the accumulation at any time.³ Consequently such accumulation, as it can be stopped at any time, is not obnoxious to the Thellusson Act, any more than it is to the Rule against Perpetuities.⁴

276. *Bective v. Hodgson*, 10 H. L. C. 656, 664, 671 (see *Matthews v. Keble*, L. R. 4 Eq. 467, 472). *Pursell v. Elder*, 4 Macq. 992. *Wade-Gery v. Handley*, 1 Ch. D. 653, 664; 3 Ch. D. 374. *Ralph v. Carrick*, 5 Ch. D. 984, 997, 998; 11 Ch. D. 873. *Lord v. Colvin*, 23 Dunlop, C. of Sess. 111. See *Tench v. Cheese*, 6 De G. M. & G. 453, 462, 463; *Macpherson v. Stewart*, 28 L. J. Ch. 177; 32 L. T. 143; *Mathews v. Keble*, L. R. 3 Ch. 691; *Mackenzie v. Mackenzie*, 4 Rettie, C. of Sess. 962; *Smyth v. Kinloch*, 7 Rettie, C. of Sess. 1176; *Elder's Trustees v. Treasurer of Free Church*, 20 Rettie C. of Sess. 2; *Harg. Thel. Act*, §§ 67 *et seq.*; 1 Jarm. Wills (6th ed.) 379, 380; *Marsden, Perp.* 325-330.

¹ See *Griffiths v. Vere*, 9 Ves. 127, 136; and cf. *Lombe v. Stoughton*, 12 Sim. 304.

² See *Tench v. Cheese*, 6 De G. M. & G. 453, 462, 463; *Matthews v. Keble*, L. R. 3 Ch. 691, 696; *Bryan v. Collins*, 16 Beav. 14; 1 Jarm. Wills (6th ed.) 380; *Marsden, Perp.* 330; and cf. *Wilson v. Wilson*, 1 Sim. N. s. 288.

³ See *Josselyn v. Josselyn*, 9 Sim. 63; *Saunders v. Vautier*, 4 Beav. 115; *Cr. & Ph.* 240; *Gosling v. Gosling*, Johns. 265; *Hilton v. Hilton*, L. R. 14 Eq. 468.

⁴ *MacVean v. MacVean*, 24 Vict. L. R. 835. § 672, *ante*. *Marsden, Perp.* 333. As to charities, see §§ 679, 679 *a*, *ante*.

§ 693. In *Bassil v. Lister*¹ a testator directed his trustees to pay, out of the income of his property, the premiums upon policies of insurance which had been effected by him upon the lives of his sons; on the marriages of the sons the policies to be settled for the benefit of their widows and children. Turner, V. C., held that this direction was valid for the whole of the lives insured and not merely for twenty-one years after the testator's death. This decision is criticised by the editors of Jarman on Wills.²

§ 694. Like the Rule against Perpetuities, the Thellusson Act is not a rule of construction, but a positive command of law given for the purpose of defeating intention. A settlement or will is therefore to be construed as if the Thellusson Act did not exist, and then the Act applied. The Act does not have the effect of accelerating the enjoyment of the property.³

§ 695. Four periods during which accumulation is allowed are mentioned in the Act. One only of the periods can be taken.⁴

§ 696. (I.) The first period is "the life or lives of any such grantor or grantors, settler or settlers."⁵ Of course there cannot be any such provision in a will.⁶

§ 697. (II.) The second period is "the term of twenty-one years, from the death of any such grantor, settler, devisor, or testator."⁷ This period begins to run from the testator's death or the date of the settlement, although the accumulation does not begin then, but later. Therefore accumulation beginning twelve years after the

¹ 9 Hare, 177.

² 1 Jarm. Wills (6th ed.) 391 *et seq.* See *Re Errington*, 76 L. T. R. 616; 45 W. R. 573; 1 Perry, Trusts (6th ed.) § 400; cf. § 699 *b, post.*

³ *Eyre v. Marsden*, 2 Keen, 564, 574. *Nettleton v. Stephenson*, 3 De G. & Sm. 366. *Green v. Gascoyne*, 4 De G. J. & S. 565. *Weath-erall v. Thornburgh*, 8 Ch. D. 261. *Harrison v. Harrison*, 7 Ont. L. R. 297. *Colquhoun v. Colquhoun's Trustees*, 19 Rettie, C. of Sess. 946. *Smith v. Glasgow Infirmary*, [1909] Sessions Cases, 1231. On the dis-

position of the income during the *interim*, see §§ 700-708, *post.*

⁴ *Rosslyn's Trust*, 16 Sim. 391. *Wilson v. Wilson*, 1 Sim. N. S. 288. *Jagger v. Jagger*, 25 Ch. D. 729. *Re Errington*, 76 L. T. R. 616; 45 W. R. 573. But see 2 Prest. Abs. 180; Harg. Thel. Act, §§ 109, 110.

⁵ *Fonseca v. Jones*, 21 Manitoba, 168, 184.

⁶ See *Heywood v. Heywood*, 29 Beav. 9; Harg. Thel. Act, § 89; and see *Re Errington*, 76 L. T. R. 616; 45 W. R. 573; *Fonseca v. Jones*, 21 Manitoba, 168, 184.

⁷ Harg. Thel. Act, § 90 *et seq.*

testator's death can last only nine years.¹ The day of the testator's death is excluded from the twenty-one years. Thus when a testator died Jan. 5, 1820, dividends due Jan. 5, 1841, were held within a trust for accumulation.²

§ 698. (III.) The third period is "during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, deviser or testator."³

§ 699. (IV.) The fourth period is "during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will or other assurances, directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated." Under this clause it has been held that an accumulation beginning at the testator's death cannot continue till the coming of age of a person unborn at the testator's death, but lasts only, under (II), for twenty-one years from the testator's death.⁴ It was said in *Haley v. Bannister*⁵ and *Bryan v. Collins*⁶ that accumulations could not be made during the minorities of persons unborn at the death of the testator;⁷ but it has never been decided that accumulations beginning at the birth of such a person cannot continue till he is twenty-one. If a provision for such accumulation is bad, then this fourth clause adds nothing to the third, and might have been omitted from the Statute; and the provisions for accumulation of income during minorities, common in English wills and settlements, are invalid. The text-writers generally

¹ *Webb v. Webb*, 2 Beav. 493. *A. G. v. Poulden*, 3 Hare, 555. *Shaw v. Rhodes*, 1 Myl. & Cr. 135. *Nettleton v. Stephenson*, 3 De G. & Sm. 366. *Campbell's Trustees v. Campbell*, 18 Rettie, C. of Sess. 992.

² *Gorst v. Lowndes*, 11 Sim. 434. In *St. Aubyn v. St. Aubyn*, 1 Dr. & Sm. 611, land was devised to A. for twenty-one years, on an accumulating trust, and then to B. A. contended that rent falling due next after the end of the twenty-

one years should be apportioned under the St. 4 & 5 Wm. IV. c. 22. It was objected that this would violate the Thellusson Act, but the Court overruled the objection.

³ Harg. Thel. Act, §§ 93 *et seq.*

⁴ *Longdon v. Simson*, 12 Ves. 295. *Haley v. Bannister*, 4 Mad. 275. *Ellis v. Maxwell*, 3 Beav. 587.

⁵ 4 Mad. 275.

⁶ 16 Beav. 14, 17.

⁷ See *Ellis v. Maxwell*, 3 Beav. 587, 596, 597.

inclined to the opinion that provisions for accumulation which do not violate the Rule against Perpetuities are good if they begin with the birth of an unborn child, and end at his coming of age;¹ and it has now been so held in *In re Cattell*.²

§ 699 *a*. The Statute of 55 and 56 Vict. c. 58,³ restricts accumulations for the purchase of land to cases falling within this class IV.⁴

§ 699 *b*. Provisions in a will authorizing the employment of income for "maintaining in good habitable repair houses and tenements on the property," or in rebuilding, reinstating or substantially repairing them, are not within the Thellusson Act.⁵

§ 700. An important question under the Thellusson Act is to determine what becomes of income which the settlor or testator has directed to be accumulated, but which the Act forbids to be accumulated, and which it provides shall "go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."⁶ If there is a vested gift in possession, the income released, by the Act, from accumulation goes to the persons entitled to the estate.⁷ But when there is no vested interest, or when the possession of a vested interest is postponed, there is, as has been said,⁸ no acceleration, and it remains, therefore, to consider what becomes of the income during the *interim*.

¹ 1 Jarm. Wills (6th ed.) 382.
³ Dav. Prec. Conv. (3d ed.) 178, note, 469, note. Marsden, Perp. 337, 338. Harg. Thel. Act, §§ 95-107. See *Wilson v. Wilson*, 1 Sim. N. S. 288; *Sidney v. Wilmer*, 4 De G. J. & S. 84. But see *In re Dawson*, 13 The Reports, 633.

² [1907] 1 Ch. 567; [1914] 1 Ch. 177.

³ § 686, note, *ante*.

⁴ See *In re Dawson*, 13 The Reports, 633.

⁵ *Vine v. Raleigh*, [1891] 2 Ch. 13. *In re Mason*, [1891] 3 Ch. 467. See § 693, *ante*; *In re Hurlbatt*, [1910] 2 Ch. 553. See also St. 44 & 45 Vict. (1881), c. 41, § 42, giving powers to trustees to accumulate income during minorities. Cf. 93 Law Times, 267.

⁶ Harg. Thel. Act, §§ 127 *et seq.*

⁷ *Trickey v. Trickey*, 3 Myl. & K. 560, 565. *Clulow's Trust*, 1 J. & H. 639. *Coombe v. Hughes*, 34 Beav. 127; 2 De G. J. & S. 657. *Harbin v. Masterman*, L. R. 12 Eq. 559; [1894] 2 Ch. 184. 1 Jarm. Wills (5th ed.) 281. *Ogilvie v. Kirk Session of Dundee*, 8 Dunlop, C. of Sess. 1229. *Mackenzie v. Mackenzie*, 4 Rettie, C. of Sess. 962. *Maxwell v. Maxwell*, 5 Rettie, C. of Sess. 248. *Smyth v. Kinloch*, 7 Rettie, C. of Sess. 1176. *Colquhoun v. Colquhoun's Trustees*, 19 Rettie, C. of Sess. 946. See *Burgh of Ayr v. Shaw*, 12 Sc. L. T. R. 126.

⁸ § 694, *ante*.

§ 701. *First. As to Land.* — If land is given in trust to accumulate the income, the income, beyond the time allowed by the Act, goes as in other void devises; that is, at common law to the heir; under the Wills Act ¹ (1837) to the residuary devisee.² In case there is no heir or residuary devisee, then it goes to the Crown by escheat.³

§ 702. The heir's interest will be generally either an interest *pur auter vie* or a leasehold interest, and on his death, therefore, any subsequently accruing income will go to his executor or administrator, and not to his heir.⁴

¹ 1 Vict. c. 26, § 25.

² § 248, *ante*. *Smith v. Lomas*, 33 L. J. Ch. 578. *Eyre v. Marsden*, 2 Keen, 564, 574. *Sewell v. Denny*, 10 Beav. 315. *Halford v. Stains*, 16 Sim. 488. *Nettleton v. Stephenson*, 3 De G. & Sm. 366. *Wildes v. Davies*, 1 Sm. & G. 475, 484. *Edwards v. Tuck*, 3 De G. M. & G. 40. *Green v. Gascoyne*, 4 De G. J. & S. 565, 572. See *Campbell's Trustees v. Campbell*, 18 Rettie, C. of Sess. 992; *Smith v. Glasgow Infirmary*, [1909] Sessions Cases, 1231; *Dibbs v. Barrington*, 15 N. S. Wales R. Eq. 149.

³ *Weatherall v. Thornburgh*, 8 Ch. D. 261.

⁴ *Sewell v. Denny*, 10 Beav. 315. In 1 Jarm. Wills (4th ed.) 313, it is said that before the Wills Act, 1 Vict. c. 26, § 6, the interest *pur auter vie* would have gone to the heir's heir; and *Halford v. Stains*, 16 Sim. 488, 496, seems to have been decided on that ground; see also *Marsden*, Perp. 339. But the provision in the Wills Act that an estate *pur auter vie* shall go to the personal representative is merely a re-enactment of the Statute of Frauds (29 Car. II. c. 3), § 12, and the St. of 14 Geo. II. c. 20, § 9; and equitable interests are within the latter statutes. *Withers v.*

Withers, Amb. 151. *Jickling*, Eq. Est. 193. And the statement in 1 Jarm. Wills (6th ed.) 391, is that "his interest passes to his executor or administrator and not to his heirs."

In *Barrett v. Buck*, 12 Jur. 771, land was devised in 1820 to trustees, in trust to sell, and hold the proceeds in trust to accumulate the income during several lives. It was admitted by all parties that, the heir having died, the income of the proceeds during these lives after twenty-one years had elapsed went to the heir's executor. Mr. Jarman's editors, 1 Jarm. Wills (4th ed.) 313, think that this admission should not have been made; and in this they are followed by Mr. Marsden, Perp. 339, note (c), where "heir" is a misprint for "heir's executor." But the admission seems correct, both on the ground above stated, viz. that before as well as after the Wills Act an interest *pur auter vie* went to the executor; and also, in the second place, because, even though income of the unconverted land would have gone to the heir's heir, the income of the proceeds would go to his executor, for while the conversion did not deprive the heir of his interest in the land, *Eyre v. Marsden*, 2

§ 703. When the trust to accumulate is a charge on the land, and not an estate therein, the income, after the period for accumulation allowed by the Act has passed, goes to the persons entitled to the estates free from the charge. This is, in truth, a case where there is a present estate given, with a void provision for accumulation.¹

§ 704. *Second. As to Personal Property.* — Income released from accumulation by the Act, when there is no present gift, goes to the residuary legatee; or if there is no residuary legatee, or if it is the income of the residue, or part of it, which the testator has directed accumulated, then to the next of kin;² or, if there be no next of kin, then to the Crown.³

§ 705. If the property be partly real, partly personal, the income

Keen, 564, 574, 575, *In re Perkins*, 101 L. T. R. 345, yet he took the proceeds as what they were, — personal estate. 1 L. C. in Eq. (5th ed.) 967, 968. And the remark of Mr. Jarman's editors on *Barrett v. Buck* is omitted in the fifth and sixth editions. 1 Jarm. Wills (5th ed.) 283, (6th ed.) 391.

¹ § 700, *ante*. *Shaw v. Rhodes*, 1 Myl. & Cr. 135; *sub nom.* *Evans v. Hellier*, 5 Cl. & F. 114. *Clulow's Trust*, 1 J. & H. 639. But it should be observed that when an existing charge on land is devised, and an accumulation of the income directed, income, the accumulation of which is forbidden by the Act, passes to the testator's next of kin. *Simmons v. Pitt*, L. R. 8 Ch. 978.

² *Haley v. Bannister*, 4 Mad. 275, 277, 278. *Crawley v. Crawley*, 7 Sim. 427. *M'Donald v. Bryce*, 2 Keen, 276. *O'Neill v. Lucas*, Id. 313. *Eyre v. Marsden*, Id. 564. *Pride v. Fooks*, 2 Beav. 430, 437. *Ellis v. Maxwell*, 3 Beav. 587. *A. G. v. Poulden*, 3 Hare, 555. *Elborne v. Goode*, 14 Sim. 165. *Morgan v. Morgan*, 4 De G. & Sm. 164,

175. *Wilson v. Wilson*, 1 Sim. N. S. 288, 300. *Bourne v. Buckton*, 2 Sim. N. S. 91. *Jones v. Maggs*, 9 Hare, 605. *Edwards v. Tuck*, 3 De G. M. & G. 40. *Burt v. Sturt*, 10 Hare, 415. *Drakeley's Estate*, 19 Beav. 395. *Oddie v. Brown*, 4 De G. & J. 179. *Mathews v. Keble*, L. R. 3 Ch. 691. *Talbot v. Jevers*, L. R. 20 Eq. 255. *Weatherall v. Thornburgh*, 8 Ch. D. 261. *Re Parry*, 60 L. T. R. 489. *Elder's Trustees v. Treasurer of Free Church*, 20 Rettie, C. of Sess. 2. *Smith v. Glasgow Infirmary*, [1909] Sessions Cases, 1231. *Higginbotham v. Barrett*, 14 Vict. L. R. 803. *Lazarus v. Lazarus*, Id. 806, note. *In re Stevens*, [1912] Vict. L. R. 194. See *Keith v. Keith*, 19 Dunlop, C. of Sess. 1040; *Lord v. Colvin*, 23 Dunlop, C. of Sess. 111; *Pursell v. Elder*, 4 Macq. 992; *Burgh of Ayr v. Shaw*, 12 Sc. L. T. Rep. 126; *Dibbs v. Barrington*, 15 N. S. Wales R. Eq. 149.

³ *Weatherall v. Thornburgh*, 8 Ch. D. 261. *Harbin v. Masterman*, L. R. 12 Eq. 559.

of the realty goes to the heir or residuary devisee; of the personalty, to the next of kin or residuary legatee.¹

§ 706. When an accumulation has been lawfully made, e. g. for twenty-one years after the testator's death, a question arises as to the income of the accumulations. The income of the accumulations of income from personalty (unless ordered to be invested in land) must go to the residuary legatees or next of kin. The accumulations of the income of realty (unless ordered to be invested in realty) would seem, in spite of their origin, to be personalty, and their income therefore also to go to the residuary legatees or next of kin. Mr. Jarman's editors² say, "The accumulations of rents and profits seem to preserve their character of realty, so that the heir is entitled to the income of such accumulations."³ *Eyre v. Marsden*,⁴ cited by them for this, is not a very satisfactory authority on the point. It was there held that when the purposes for which the conversion of land was ordered partly failed, the proceeds of the land were to be considered as realty, and that the income beyond the lawful period of accumulation went to the heir. The language of the decision appears to carry to the heir also the income of the accumulations lawfully made; but no reason is given for this, and the attention of the Court does not seem to have been directed to the point.⁵

§ 707. When there is a present gift to one for life, with remainder over, and a void provision for accumulation, the released income goes to the life tenant during his life.⁶

§ 708. When there is no present gift, and therefore the released income falls into the residue, but the residue is given to one for life, with remainder over, it was held in *Crawley v. Crawley*⁷ that the released income was to form part of the capital of the residue.⁸ But this seems wrong; if the income directed to be accumulated in violation of the Act is added to the principal of the residue during

¹ *Eyre v. Marsden*, 2 Keen, 654. Ralph v. Carrick, 5 Ch. D. 984, 997, 998. See *Talbot v. Jevers*, L. R. 20 Eq. 255; *Harrison v. Harrison*, 7 Ont. L. R. 297.

² 1 Jarm. Wills (6th ed.) 388 *et seq.*

³ So *Marsden*, Perp. 342.

⁴ 2 Keen, 564.

⁵ *Fitch v. Weber*, 6 Hare, 145, cited in 1 Jarm. Wills (5th ed.) 282, does not bear on this question.

⁶ *Trickey v. Trickey*, 3 Myl. & K. 560, 565. *Coombe v. Hughes*, 34 Beav. 127; 2 De G. J. & S. 657.

⁷ 7 Sim. 427.

⁸ So also in *O'Neill v. Lucas*, 2 Keen, 313, 316.

the life of the life tenant, the income is being accumulated, though not compounded, until the life tenant's death; and therefore the decision of Malins, V. C., in *Re Phillips*,¹ that the life tenant should have the whole of the released income, seems correct,² and *Re Phillips* was followed in *Otterson v. Gould*.³ But *Crawley v. Crawley* was followed in *Re Pope*.⁴ Mr. Charles Sweet says:⁵ "The decision in *Re Phillips* seems on principle to be correct (see Gray, Perp. § 708); but the rule laid down in *Crawley v. Crawley* may now be considered as established beyond question."⁶

§ 709. The second section of the Act exempts three classes of provisions from its operation.

§ 710. *First*. "Any provision for payment of debts of any grantor, settlor, or devisor, or other person or persons."⁷ This includes the debts of persons other than those making the provisions. Such was the opinion of Lord St. Leonards, C., in *Barrington v. Liddell*,⁸ in opposition to that of Turner, V. C., in the same case.⁹ The clause applies to contingent debts¹⁰ and to future debts.¹¹ The accumulation must be *bona fide* for paying debts only, and not for that and other purposes.¹²

§ 711. *Second*. "Any provision for raising portions for any child or children of any grantor, settlor, or devisor, or any child or children of any person taking any interest under any such conveyance, settlement, or devise."¹³ The portion may have been created by an instru-

¹ 49 L. J. Ch. 198.

² See *Morgan v. Morgan*, 4 De G. & Sm. 164. Harg. Thel. Act, § 71.

³ 11 N. Z. L. R. 577.

⁴ [1901] 1 Ch. 64.

⁵ 1 Jarm. Wills (6th ed.) 389, note (u).

⁶ See Theob. Wills (7th ed.) 619.

⁷ Harg. Thel. Act, §§ 138 *et seq.*

⁸ 2 De G. M. & G. 480, 497.

⁹ 10 Hare, 429, 434; and see *Varlo v. Faden*, 27 Beav. 255, 264; 1 De G. F. & J. 211, 224; *Mathews v. Keble*, L. R. 3 Ch. 691.

¹⁰ *Varlo v. Faden*, 27 Beav. 255,

264; 1 De G. F. & J. 211. *In re Hurlbatt*, [1910] 2 Ch. 553.

¹¹ See *Barrington v. Liddell*, 2 De G. M. & G. 480, 490; *Varlo v. Faden*, 27 Beav. 255, 264; 1 De G. F. & J. 211. Cf. *Smyth v. Kinloch*, 7 Rettie, C. of Sess. 1176.

¹² *Mathews v. Keble*, L. R. 3 Ch. 691, 698, 699. See *Varlo v. Faden*, 27 Beav. 255, 265; 1 De G. F. & J. 211, 224, 225; *Tewart v. Lawson*, L. R. 18 Eq. 490; *In re Heathcote*, [1904] 1 Ch. 826; 1 Jarm. Wills (6th ed.) 367; *Marsden, Perp.* 343, 344.

¹³ See *Challis, Real Prop.* (3d ed.) 204; *Lewin on Trusts* (10th ed.) 95, 96.

ment prior to that directing the accumulation,¹ or it may be created² by the instrument directing the accumulation.³ But a gift of the whole of a testator's estate,⁴ or of a residue comprising the bulk of it,⁵ is not a portion. A gift of a specific sum to be accumulated for children has been held to be a portion;⁶ but the point is doubtful. A gift to the survivors of the children of a class of six or seven persons has been held not a portion.⁷ If the parent is to share in accumulations which may extend beyond the time fixed by the first section of the Act, the gift is not a portion.⁸ If there is a trust to accumulate a portion for the children of A., and he never has any children, although the accumulation will continue through A.'s life, the accumulations will not go on his death as it is directed that they shall go in default of children, but they will belong to the persons who would have been entitled to them had there been no provision for accumulation.⁹ The children must be legitimate; if any are illegitimate, the whole gift is within the Act.¹⁰ The interest taken by a person in order to bring a por-

¹ *Barrington v. Liddell*, 10 Hare, 429, 431, 432; 2 De G. M. & G. 480, 498, *et seq.* (see *Halford v. Stains*, 16 Sim. 488, 496).

² Notwithstanding *Halford v. Stains*, *ubi sup.*

³ *Beech v. St. Vincent*, 3 De G. & S. 678. *In re Stephens*, [1904] 1 Ch. 322. See *Bourne v. Buckton*, 2 Sim. N. S. 91, 96; *Barrington v. Liddell*, 10 Hare, 429, 431; 2 De G. M. & G. 480, 498 *et seq.*; 1 Jarm. Wills (6th ed.) 384.

⁴ *Wildes v. Davies*, 1 Sm. & G. 475.

⁵ *Shaw v. Rhodes*, 1 Myl. & Cr. 135, 159; *sub nom.* *Evans v. Hellier*, 1 Cl. & F. 114. *Eyre v. Marsden*, 2 Keen, 564, 573. *Bourne v. Buckton*, 2 Sim. N. S. 91. *Edwards v. Tuck*, 3 De G. M. & G. 40. *Mathews v. Keble*, L. R. 3 Ch. 691, 696, 697. *Re Walker*, 54 L. T. R. 792. *Mackay's Trustees v. Mackay*, [1909] Sessions Cases, 139.

⁶ *Middleton v. Losh*, 1 Sm. &

G. 61. *St. Paul v. Heath* (before Stuart, V. C.), 13 L. T. N. S. 271. See *Barrington v. Liddell*, 2 De G. M. & G. 480; *Colquhoun's Trustees v. Colquhoun*, [1907] Sessions Cases, 346; 1 Jarm. Wills (6th ed.) 385, 386. *Contra* are *Jones v. Maggs*, 9 Hare, 605; *Morgan v. Morgan*, 4 De G. & Sm. 164, 170 *et seq.*; and see Tud. L. C. in *Real Prop.* (4th ed.) 635-637; *Theob. Wills* (7th ed.) 617, 618; *Harg. Thel. Act*, §§ 153 *et seq.*; *Marsden, Perp.* 345, 346; and cf. *Burt v. Sturt*, 10 Hare, 415; *Cain v. Watson*, [1910] Vict. L. R. 256, 274 *et seq.*

⁷ *Drewett v. Pollard*, 27 Beav. 196; and see *Burt v. Sturt*, 10 Hare, 415, 426, 427.

⁸ *Watt v. Wood*, 2 Dr. & Sm. 56.

⁹ *Clulow's Trust*, 1 J. & H. 639.

¹⁰ *Shaw v. Rhodes*, 1 Myl. & Cr. 135, 159.

tion for his children within this exception need not be an interest in the property of which the income is to be accumulated. It is enough if such person takes any interest, however small or remote, under the will.¹ If the portions are for a class of children, some of whose parents take no interest under the settlement or will, the whole gift is void.²

§ 712. *Third.* "Any direction touching the produce of timber or wood upon any lands or tenements."³

§ 713. The question of costs in suits involving the application of the Thellusson Act has been discussed in several cases.⁴

§ 714. Originally the Act did not "extend to any disposition respecting heritable property" in Scotland.⁵ Movable property in Scotland was, however, within the Act. In *Ogilvie v. Kirk Session of Dundee*⁶ land in Scotland was given to trustees with discretion to sell, and after payments of debts and legacies they were directed to pay £2,000 or the "balance" of the estate to a charity. It was held that this gift was within the Thellusson Act, as of movable property. In 1848, by St. 11 & 12 Vict. c. 36, § 41, the operation of the Act was extended to heritable property in Scotland. This last Statute does not affect deeds made before its passage.⁷ The Thellusson Act does not extend to Ireland.⁸ It is in force in Victoria.⁹

¹ *Barrington v. Liddell*, 2 De G. M. & G. 480, reversing s. c. 10 Hare, 429. See *Evans v. Hellier*, 5 Cl. & F. 114, 126, 127; *Edwards v. Tuck*, 3 De G. M. & G. 40, 63; *Bourne v. Buckton*, 2 Sim. N. S. 91, 101; *Morgan v. Morgan*, 4 De G. & Sm. 164, 174; 1 Jarm. Wills (6th ed.) 387.

² *Eyre v. Marsden*, 2 Keen, 564, 573.

³ See Harg. Thel. Act, §§ 163 *et seq.*; *Marsden, Perp.* 346, 347.

⁴ See *Eyre v. Marsden*, 4 Myl. & Cr. 231 (reversing on this question s. c. 2 Keen, 564); *Barrett v. Buck*, 12 Jur. 771; *Elborne v. Goode*, 14 Sim. 165, 178; *Ralph v. Carrick*, 5 Ch. D. 984, 998; *Green v. Gascoyne*, 4 De G. J. & S. 565.

⁵ 40 Geo. III. c. 98, § 3. See §§ 759, 760, *post*.

⁶ 8 Dunlop, C. of Sess. 1229.

⁷ *Keith v. Keith*, 19 Dunlop, C. of Sess. 1040. *McLarty v. McLaverty*, 2 Macph. 489.

⁸ On the conflict between English and Scotch and English and Irish law on the subject of the Thellusson Act, see *Fordyce v. Bridges*, 2 Phil. 497, 515; § 263, *ante*; *Macpherson v. Stewart*, 28 L. J. Ch. 177; 32 L. T. 143; §§ 259, 264, *note, ante*; *Freke v. Carbery*, L. R. 16 Eq. 461; §§ 259, 264, *ante*; *Ellis v. Maxwell*, 12 Beav. 104; § 259 *a, ante*; *Heywood v. Heywood*, 29 Beav. 9; § 261, *ante*.

⁹ *Hastie v. Arsdie*, 6 W. W. & A'B. Eq. 91. *Higginbotham v. Barrett*, 14 Vict. L. R. 803. *Lazarus v. Lazarus*, Id. 806, *note*. *Cain v. Watson*, [1910] Vict. L. R. 256.

It is declared by the Ontario St. of 52 Vict. (1889), c. 10, § 2, to have been and to be in force in Ontario, *contra* to what had been held in *Harrison v. Spencer*.¹

§ 715. *Pennsylvania*. — By the St. of April 18, 1853, § 9,² a Statute suggested by the Thellusson Act, accumulations are restrained. The text of the Statute is given in a note.³ By the St. of April 26,

¹ 15 Ont. 692. See *Harrison v. Harrison*, 7 Ont. L. R. 297.

The most elaborate treatise on the Thellusson Act is by John F. Hargrave, published in 1842; it has never been reprinted.

This appendix is much indebted to Jarman on Wills and Marsden on Perpetuities. The cases arising in Scotland are not, however, in those treatises. They have been here added. See also Tud. L. C. in Real Prop. (4th ed.) 625-638; and Theob. Wills (5th ed.) 534-540. A series of articles of slight value will be found 64 Law T. 457; 65 Law T. 41, 63, 80, 136.

² 4 Bright. Purd. Dig. (13th ed.) (1910) 4036. A full discussion of this Statute and of the decisions under it will be found. Foulke, Treatise, §§ 623-697.

³ "No person or persons shall, after the passing of this Act, by any deed, will or otherwise, settle or dispose of any real or personal property, so and in such manner that the rents, issues, interests, or profits thereof shall be wholly or partially accumulated, for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or testator, and the term of twenty-one years from the death of any such grantor, settler or testator; that is to say, only after such decease during the minority or respective minorities,

with allowance for the period of gestation of any person or persons who, under the uses or trusts of the deed, will or other assurance directing such accumulation, would, for the time being, if of full age, be entitled unto the rents, issues, interests and profits so directed to accumulate. And in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, in so far as it shall exceed the limits of this Act; and the rents, issues, interests and profits so directed to be accumulated, contrary to the provisions of this Act, shall go to and be received by such person or persons as would have been entitled thereto, if such accumulation had not been directed: *Provided*, That any donation, bequest or devise for any literary, scientific, charitable or religious purpose, shall not come within the prohibition of this section; which shall take effect and be in force, as well in respect to wills heretofore made by persons yet living and of competent mind, as in respect to wills hereafter to be made: *And provided*, That notwithstanding any direction to accumulate rents, issues, interest and profits, for the benefit of any minor or minors, it shall be lawful for the proper court as aforesaid, on the application of the guardian, where there shall be

1855, § 12,¹ charitable corporations and associations are forbidden to accumulate the income of their property so as to acquire a capital in excess of limits fixed by statute.

§ 716. Under the Pennsylvania Statute of 1853, as under the Thellusson Act, a provision for accumulation which transcends the statutory limits is not void *in toto*, but only for the excess.²

§ 717. The Statute allows accumulation only during the minority of a person who would, for the time being, if of full age, be entitled to the income so directed to accumulate. Therefore income cannot be accumulated during the minority of A., unless A. would be entitled to the income if of full age. Suppose property is given in trust to pay the income to A. for life, and on A.'s death to transfer the principal to B., and there is a direction to accumulate the income during A.'s minority, and to add the accumulations to the principal. Such a direction would certainly appear to be authorized by the Statute. If A. were of full age, he would be entitled to the income; and that is enough, according to the Statute, to make the accumulation lawful. If A. would get the income if over age, accumulations made while he is under age ought to be good, to whomsoever they go, for there is nothing in the Statute requiring them to go to A. or any other person. Nevertheless, it has been held that such a direction is void altogether, and however little such a doctrine is justified by the Statute, it is now settled.³

no other means for maintenance or education, to decree an adequate allowance for such purpose, but in such manner as to make an equal distribution among those having equal rights or expectancies, whether, at the time being, minors or of lawful age." The Pennsylvania Statute is considered in connection with the English Act in *Scott's Trusts for Accumulation*, printed at the end of the American edition (1888) of *Lewin on Trusts*. See *Foulke, Treatise*, §§ 623-625.

¹ 1 Bright. *Purd. Dig.* (13th ed.) (1910) 594.

² See *Brown v. Williamson*, 36 Pa. 338; *Butler v. Butler*, 9 Phila.

269; *Conrow's Appeal*, 3 Pennyp. 356, 366; *Leisenring's Estate*, 237 Pa. 60, 67; *Foulke, Treatise*, §§ 634, 644.

³ *Washington's Estate*, 75 Pa. 102; affirming s. c. 8 Phila. 182. *Stille's Appeal*, 4 W. N. C. 42; affirming s. c. 11 Phila. 31; 1 W. N. C. 249. *Howell's Estate*, 5 W. N. C. 430. *Carson's Appeal*, 99 Pa. 325. *Furness Minors' Estate*, 14 W. N. C. 391. *Edwards's Estate*, 190 Pa. 177. *Farnum's Estate*, 191 Pa. 75. *White's Estate*, 2 Pa. Dist. R. 207; 8 Pa. Dist. R. 33. See *Foulke, Treatise*, §§ 632, 639, 648. But see *Grim's Estate*, 15 Phila. 603, 605; 12 W. N. C. 354, 356. Cf.

§ 718. The released income goes, as under the Thellusson Act, to the heir, next of kin, or residuary devisee or legatee;¹ unless, however, there is a present gift in possession, in which case, as is also the rule under the Thellusson Act, the released income goes to the persons who would have taken it had there been no direction to accumulate.²

McKee's Appeal, 96 Pa. 277, 284, 285.

In *Brown v. Williamson*, 36 Pa. 338, property was devised to be held by A. for the use of such children as A. might have at his death, and if he should die without issue, then for the use of those who should then be the testator's heirs; and it was directed that A. should have a reasonable support out of the trust fund for personal services rendered. It was objected that this involved an accumulation during the life of A.; but the Court answered that the trust might be transgressive, but that the Act avoided only the excess in transgressive trusts. The Court seem to have overlooked the fact that under the Pennsylvania Statute accumulation is allowed only during the actual minority of a person who would be entitled to the income if of full age. It does not appear that A.'s children were minors, and they were certainly not entitled to the income until the death of A. See Foulke, *Treatise*, § 631.

In *Williams's Estate*, 13 Phila. 325, 8 W. N. C. 310, a testatrix gave the residue of her estate in trust for her son, in case he could be found within twenty years after her death. It was held by the Orphans' Court of Philadelphia that this provision did not contravene the Statute. The case is

blindly reported, but it would seem that under the Statute the income should have gone as intestate property. See Foulke, *Treatise*, § 633.

¹ *Matter of Sergeant*, 11 Phila. 8. *Mellon's Estate*, 16 Phila. 323. *Grim's Appeal*, 109 Pa. 391. *Howell's Estate*, 180 Pa. 515. *Martin's Estate*, 185 Pa. 51. *Edwards's Estate*, 190 Pa. 177. *Kenworthy's Estate*, 230 Pa. 606. *White's Estate*, 2 Pa. Dist. R. 207; 8 Pa. Dist. R. 33. See *Thouron's Estate*, 11 W. N. C. 285; *Mitcheson's Estate*, 15 Phila. 523; 11 W. N. C. 547. See as to void devises, 2 *Bright. Purd. Dig.* 299, pl. 23 (13th ed.) (1910), vol. 4, § 5145.

² *Brubaker's Appeal*, 1 Monag. 447. *Schwartz's Appeal*, 119 Pa. 337. *Sharpe's Estate*, 155 Pa. 289. *Farnum's Estate*, 191 Pa. 75. *Stiver's Estate*, 5 Pa. C. C. 113. *Estate of Myer*, 17 Phila. 425; 18 Phila. 103. *Lutz's Estate*, 27 W. N. C. 403; 20 Phila. 89; 9 Pa. C. C. 294. *Weinmann's Estate*, 223 Pa. 508. *Wright's Estate*, 227 Pa. 69. *Roney's Estate*, *Id.* 127. See *Washington's Estate*, 75 Pa. 102; *Stille's Appeal*, 4 W. N. C. 42; *Carson's Appeal*, 99 Pa. 325; *Matter of Sergeant*, 11 Phila. 8. Cf. *Wahl's Estate*, 20 Phila. 32; 26 W. N. C. 249. In *Howell's Estate*, 5 W. N. C. 430, was not the gift of the residue contingent, and ought not, therefore, the accumulations

§ 719. Suppose property is devised to trustees in trust to apply so much of the income as they deem best for A. during his life, to add any surplus to the principal, and on A.'s death to convey the principal, with all accumulations, to B. Does this direction contravene the provisions of the Pennsylvania Statute? The same question might arise in England under the Thellusson Act, and modern conveyances in England recognize that such provisions for accumulation are obnoxious to that Statute.¹ But the English Act sustains provisions for accumulation during twenty-one years, and it is therefore only in that part of a life tenant's interest which falls more than twenty-one years after the testator's death that any accumulation can be objected to. It is not strange, therefore, that the point does not seem to have actually come before the English courts. But in Pennsylvania, under the narrow construction of the Act which has been adopted,² directions to accumulate, and to add the accumulations to the principal of the fund during the life of a life tenant, are bad altogether. In *Matter of Sergeant*³ \$20,000 were bequeathed to trustees in trust to pay so much of the income as they should deem necessary for the maintenance of the testator's son, and to accumulate the balance, and add it to the principal, which was given over, on the son's death, to certain specified persons. The Orphans' Court of Philadelphia held that this provision was in violation of the Act of 1853, and that the balance, not spent for the son, was part of the residuary estate.⁴

§ 720. There is a class of trusts of common occurrence in Pennsylvania,⁵ called spendthrift trusts, by which trustees are authorized to apply the income of a fund to the support of a certain person for life, with a gift over on his death. There is no express direction what shall be done with any income not required for the support of such person; but it is held that neither the *cestui que trust* nor his creditors can compel the trustees of such a trust to pay the whole

to have gone to the next of kin? Perhaps the residuary legatee was the next of kin. See Foulke, Treatise, §§ 635, 640, 652, 679-694.

¹ 4 Dav. Prec. Conv. (3d ed.) 168. Hayes & Jarm. Forms of Wills (8th ed.) 215, 216.

² § 717, *ante*.

³ 11 Phila. 8.

⁴ See *Edwards's Estate*, 190 Pa. 177.

⁵ See the Pennsylvania cases discussed in Gray, *Restraints on Alienation* (2d ed.), §§ 214-235 *h*.

income to him or them,¹ and that any accumulated balance does not belong to the *cestui que trust* or his legal representatives.² How can the allowance of such accumulations be reconciled with the Act of 1853?³

§ 721. In *Ashhurst v. Given*,⁴ which was decided before the passage of the Act of 1853, the Court seem to have supposed that such an accumulation would be held void under the Thellusson Act; and in *Brown v. Williamson*,⁵ where the trust created seems to have been considered of this nature, the Court said that it might be transgressive, but only for the excess;⁶ but since that time such trusts have been repeatedly before the courts, without any suggestion that they violated the Act of 1853.

§ 722. In *Barger's Appeal*⁷ a testator empowered his trustee, at the end of seven years from his death, to divide the residue of his estate among his children (or if any should die, to their children the parent's share), and gave the trustee the power to retain any part of a child's share till then, and directed that their interest was not to vest till then. It was held that this discretionary right in the trustee to accumulate did not conflict with the Act.⁸ The ground would seem to be that the power was discretionary,⁹ and the same reason would sustain spendthrift trusts. There appears to be no particular cause why a discretionary power to accumulate should be made an exception, — the Statute is in very positive terms; and in *Matter of Sergeant*¹⁰ such an express discretionary power was held to violate the Statute; yet certainly there should be no difference between an express and an implied discretion.¹¹

§ 722 a. In *Eberly's Appeal*¹² a testator gave the residue of his property, mostly real estate, to a trustee in trust to manage it as if

¹ *Horwitz v. Norris*, 49 Pa. 213, 222.

² *Huber's Appeal*, 80 Pa. 348.

³ See full discussion, Foulke, Treatise, §§ 671–678.

⁴ 5 W. & S. 323, 329, 330.

⁵ 36 Pa. 338, 341.

⁶ See § 717, note, *ante*. Cf. *Brooks's Estate*, 140 Pa. 84.

⁷ 100 Pa. 239.

⁸ See *Ashhurst's Estate*, 18 Phila. 37.

⁹ See also *Conrow's Appeal*, 3 Pennyp. 356, 366; Foulke, Treatise, § 634.

¹⁰ 11 Phila. 8; § 719, *ante*.

¹¹ See *Barger's Appeal* justly criticised in *Grim's Estate*, 15 Phila. 603; 12 W. N. C. 354.

¹² The author was originally indebted for the opinion in this case to the kindness of A. B. Sharpe, Esq., of Carlisle, Pa. *Eberly's Appeal* is now reported, 110 Pa. 95.

it were his own property, to keep up the repairs of the homestead, to provide for the maintenance and education of the testator's son J., and upon J.'s reaching twenty-one to pay him \$500 annually until he reached twenty-five; then if J. was "a sober and well doing man, competent to take care and manage his estate," to convey and transfer the property to him; but if J. should not be a fit person to take charge of the estate, the testator directed that he should receive \$500 annually for life; and on his death the testator gave all the property to the heirs of J. When J. reached twenty-one the accumulations in the trustee's hands amounted to about \$5,000, and J. filed a petition to have them paid over to him. The Court ruled that it did not appear that the \$5,000 were more than it was judicious and proper for the trustee to keep on hand to meet the charges on the estate, and dismissed the petition.¹

§ 722 b. The Court therefore had not to consider the question whether the Act of 1853 affected spendthrift trusts. They say, however, that "the language of the Act is very comprehensive, and while it is perhaps to be regretted that it is so sweeping in its terms we are constrained to adhere to the construction that has heretofore been given to it. . . . It is not essential that the direction to accumulate should be expressed. If the estate is disposed of so or in such manner that accumulations clearly beyond what may be reasonably required to fully and effectually carry out the provisions of the trust must necessarily exist, it amounts to an implied direction to accumulate." This rather points in the direction of disallowing accumulations under spendthrift trusts.

§ 722 c. In *Lutz's Estate* ² Penrose, J., in the Orphans' Court of Philadelphia, refused to extend the doctrine of *Eberly's Case* to the case of a direction to apply income in paying off incumbrances, and held that such direction was invalid; and this was reaffirmed by the same learned judge when the case was again before the Court. *Lutz's Estate*.³

§ 722 d. In *Hibb's Estate* ⁴ a testator gave property in trust for

¹ Eberly's Appeal was followed in Mitcheson's Estate, 5 Pa. C. C. 99; 22 W. N. C. 46; and Spring's Estate, 216 Pa. 529. See Levy's Estate, 1 Pa. Dist. R. 217; Foulke, Treatise, §§ 637, 647, 663-670. Cf. Williamson's Estate, 143 Pa. 150.

² 18 Phila. 114.

³ 27 W. N. C. 403; 20 Phila. 89; 9 Pa. C. C. 294.

⁴ 143 Pa. 217. See Foulke, Treatise, §§ 646, 664.

his son S., the trustee to pay over to S. "whatever portion of it he shall deem necessary for him to have; the balance, if any, to be invested by him for his benefit." There was a gift over on the death of S. The trustee had a balance of income in his hands of some \$5,000. The Court held that "in common prudence a contingent fund should be provided in anticipation of decrease of income, sickness, and the like," and that it could not assume that the trustee had abused his discretion. And a like decision was made in *Howell's Estate*,¹ in which case it was also decided that such accumulations temporarily made went, when the occasion for retaining them ceased, to the next of kin.

§ 723. Whether accumulation can be allowed during a succession of minorities for twenty-one years after a testator's death, has been doubted.²

§ 724. The Act expressly excludes accumulations for charity from its operation.³ And directions to accumulate for a charity are not void, because individuals may incidentally profit by the accumulations.⁴ But accumulations will not be saved from the effect of the Statute because they are, on a certain contingency, to be given to a charity.⁵

§ 725. The Act has been held not to affect lands out of the State, although, *semble*, the title was in a Pennsylvania trustee.⁶ In *De Renne's Estate* ⁷ a citizen of Georgia bequeathed personal property to a Pennsylvania corporation on such trusts as would not be allowed by the Pennsylvania Statute. The Orphans' Court of Philadelphia held that the Statute did not apply. This ruling seems questionable. Does not the Statute forbid the doing of certain acts in Pennsylvania as against public policy? But *De Renne's Case* was

¹ 180 Pa. 515. To the same effect is *Lafferty's Estate*, 19 Pa. C. C. 127; 20 Pa. C. C. 632.

² *Furness Minors' Estate*, 14 W. N. C. 391; 16 Phila. 357. See *Foulke*, Treatise, § 641.

³ *Curran v. Philadelphia Trust Co.*, 15 Phila. 84; affirmed in the Supreme Court, *sub nom.* *Curran's Appeal*, 4 Pennyp. 331. *Young v. Lutheran Church*, 200 Pa. 332. But if a gift to a charity violates the

Rule against Perpetuities, it is not validated by this exception. *Estate of Rogers*, 18 Phila. 99. See *Foulke*, Treatise, §§ 653-656, 695-697.

⁴ *Lennig's Estate*, 154 Pa. 209.

⁵ See *De Renne's Estate*, 12 W. N. C. 94.

⁶ *Estate of Mellon*, 41 Leg. Int. 54.

⁷ 12 W. N. C. 94. See § 263 *a*, *ante*.

followed by the Supreme Court in *Fowler's Appeal*.¹ In both cases the *cestui's* *trust* lived out of Pennsylvania.

§ 726. *Alabama*. — A Statute of this State² provides that "no trust of estate for the purpose of accumulation only can have any force or effect for a longer term than ten years, unless when for the benefit of a minor in being at the date of the conveyance, or if by will, at the death of the testator; in which case the trust may extend to the termination of such minority." No case appears to have arisen under this Statute.

§ 726 *a. Illinois*. A Statute of this State, St. 1907, c. 1, restrains accumulations. Its provisions are given in a note.³

¹ 125 Pa. 388. See § 262, *ante*.

² Civil Code, 1907, § 3410.

³ "That no person or persons shall, after this act goes into effect, by any deed or deeds, will, codicil or otherwise howsoever executed after this act goes into effect, settle or dispose of any real or personal property, so and in such manner, either expressly or by implication, that the rents, issues, profits or produce thereof shall be wholly or partially accumulated; for any longer term than the life or lives of any such grantor or grantors, settlor or settlors, or for any longer than the term of twenty-one years from the death of any such grantor, settlor, deviser or testator; or for any longer than during the minority or respective minorities of any person or persons who shall be living, or in *ventre sa mere* at the time of the death of such grantor, deviser or testator, or for any longer than during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, will or other assurances directing such accumulations, would, for the time being, if of full age, be entitled unto the

rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated; and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void, and the rents, issues, profits and produce of such property so directed to be accumulated, shall, so long as the same shall be directed to be accumulated contrary to the provisions of this act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed: Provided, that nothing in this act contained shall extend to any provision for payment of debts of any grantor, settlor, or deviser, or other person or persons, or to any provision for raising portions for any child or children of any person taking any interest under any such conveyance, settlement or devise, or to any direction touching the produce of timber or wood upon any lands or tenements; but that all such provisions and directions shall and may be made and given as if this act had not passed."

§ 727. In New York an elaborate system of rules as to future interests and accumulations has taken the place of the common law; they are given later.¹ Some States have copied the whole system.² In Indiana the New York rules as to accumulation, and singularly enough only in relation to personal property, have been separately adopted.³

C.

LEGISLATIVE CHANGES IN THE UNITED STATES.

§ 728. The Rule against Perpetuities is judge-made law. In England the only Statutes affecting it are the Thellusson Act,⁴ and the Statutes 44 & 45 Vict. c. 41, § 42, and 55 & 56 Vict. c. 58.⁵ The Real Property Commissioners, in their Third Report, recommended numerous changes, but none of them have been adopted.

§ 729. The legislation in the United States is of three kinds: it is either —

I. A general provision that perpetuities shall not be allowed.

II. A short and simple statute declaring or modifying the law.

III. An elaborate scheme to be substituted for the common law.

§ 730. I. *A General Provision that Perpetuities shall not be allowed.* — The Constitutions of Arkansas, Nevada, North Carolina, Tennessee, and Texas, contain respectively the following provisions: — *Arkansas*: "Perpetuities and monopolies are contrary to the genius of a republic, and shall not be allowed."⁶ *Nevada*: "No perpetuities shall be allowed except for eleemosynary purposes."⁷ *North Carolina*: "Perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed."⁸ *Tennessee*: "Perpetuities and monopolies are contrary to the genius of a free State, and shall not be allowed."⁹ *Texas*: "Perpetuities and monopolies are contrary to the genius of

¹ § 747, *post*.

² At least as to real estate. See §§ 751, 752, *post*.

³ 3 Burns' Ind. Sts. § 9724. See *Dyson v. Repp*, 29 Ind. 482.

⁴ 39 & 40 Geo. III. c. 98. This

Act and the cases arising under it have been dealt with in App. B.

⁵ See §§ 676 b, 686, note, *ante*.

⁶ Const. of 1874, art. 2, § 19.

⁷ Const. of 1864, art. 15, § 4.

⁸ Const. of 1876, art. 1, § 31.

⁹ Const. of 1870, art. 1, § 22.

a free government, and shall never be allowed.”¹ These provisions seem to be simply pieces of declamation without juristic value, at least on any question of remoteness.²

§ 731. The twenty-third section of the Declaration of Rights in the North Carolina Constitution of 1776 was the first place, apparently, in which this clause occurred, and it has served as a model for the rest. It has been said to refer only to estates tail, and has been held not to affect gifts to charities.³ And that a gift to a charity is good notwithstanding the clause in the Constitution has also been held in Tennessee.⁴

§ 732. The Florida Constitutions of 1838⁵ and 1865⁶ contained a provision identical with that of North Carolina; but the framers of the Constitution of 1868 had the good sense to omit it.⁷

§ 733. The Constitution of Vermont, 1793,⁸ provides that “the Legislature shall regulate entails in such manner as to prevent perpetuities.” This was copied from the Pennsylvania Constitution of 1776;⁹ but there is no such provision in the later Constitutions of Pennsylvania. This clause appears to have had no effect on the law.¹⁰

§ 734. The statute provision in Maryland¹¹ seems more idle even than the constitutional clauses above quoted. It reads thus: “No will, testament or codicil shall be effectual to create any interest or perpetuity, or make any limitation, or appoint any uses not now permitted by the Constitution or laws of this State.” That is, an illegal will shall be an illegal will. If this were a constitutional provision, it might be important as tying up the hands of the Legis-

¹ Const. of 1876, art. 1, § 26.

² But see § 773, *post*; Gortario v. Cantu, 7 Tex. 35, 46, 47; McIlvain v. Hockaday, 36 Tex. Civ. Ap. 1; Conley v. Daughters of Republic, 151 S. W. Rep. 877 (Tex. Civ. Ap.). Cf. McLeod v. Dell, 9 Fla. 427, 447.

As to the Constitution of California, see § 752, *post*.

³ Griffin v. Graham, 1 Hawks, 96, 130 *et seq.* State v. McGowen, 2 Ired. Eq. 9. State v. Gerard, Id. 210, 221.

⁴ Franklin v. Armfield, 2 Sneed,

305, 353 *et seq.* In White v. Hale, 2 Coldw. 77, a provision that land given to a charity should never be sold was held to be avoided by this clause in the Constitution; but *semble* that apart from this clause it would have been invalid.

⁵ Art. 1, § 24.

⁶ Art. 1, § 23.

⁷ See McLeod v. Dell, 9 Fla. 427, 447.

⁸ C. 2, § 36.

⁹ § 37.

¹⁰ Giddings v. Smith, 15 Vt. 344.

¹¹ Code of 1904, art. 93, § 315.

lature from changing the common law; but as the Legislature can alter it at any time, it seems to be empty words.

§ 735. II. *A Short and Simple Statute declaring or modifying the Law.* — In Georgia, Iowa, and Kentucky, Statutes have been passed which were probably intended to be declaratory of the common law. They are as follows: —

Georgia. — “*Perpetuities.* Limitations of estates may extend through any number of lives in being at the time when the limitations commence, and twenty-one years, and the usual period of gestation added thereafter. A limitation beyond that period the law terms a perpetuity, and forbids its creation. When an attempt is made to create a perpetuity, the law gives effect to the limitations not too remote, declaring the others void, and thereby vests the fee in the last taker under the legal limitations.”¹ What is meant by the words “limitations of estates may extend”? If they mean “estates may extend,” then a life estate to an unborn person is bad, and indeed a fee simple is impossible. And if a life estate to an unborn person is good, does such person take a fee as “the last taker under the legal limitations”? And again, is an estate void which though vested in interest is not vested in possession till beyond the required limits, e. g. a so-called remainder after a long term for years?

§ 736. *Iowa.* — “Every disposition of property is void which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being, and twenty-one years thereafter.”² This seems based on the erroneous conception of the Rule against Perpetuities,³ that an alienable interest is never too remote.⁴ In *Todhunter v. D. M. I. & M. R. Co.*⁵ there was a lease of a railroad for nine hundred and ninety-nine years, and the Court held that it did not violate the Statute, on the ground that the lessor and lessee together might convey a perfect title; but neither did it violate the common-law Rule against Perpetuities.⁶ Is the statute provision a substitute for the common-law rule, or to be taken as an addition to it?⁷

¹ Code of 1910, § 3678. *Phinizy v. Wallace*, 136 Ga. 520.

² Code of 1897, § 2901.

³ See Chap. VII., *ante*.

⁴ See §§ 140, 278, *ante*; §§ 744, 748, *post*.

⁵ 58 Iowa, 205.

⁶ § 209, *ante*.

⁷ See *Meek v. Briggs*, 87 Iowa, 610; *Phillips v. Harrow*, 93 Iowa, 92; *Jordan v. Woodin*, 93 Iowa, 453; *First Bank of Montpelier v.*

§ 737. *Kentucky*. — "The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of a life or lives in being at the creation of the estate, and twenty-one years and ten months thereafter."¹ The remarks on the Iowa Statute² are applicable here also. Is the period of gestation to be allowed in addition to the twenty-one years and ten months?³

§ 738. In some of the other States short statutes have been passed modifying the common-law Rule against Perpetuities. These States are Connecticut, Ohio, Pennsylvania, Alabama, Indiana, and Mississippi.

§ 739. *Connecticut*. — "No estate in fee simple, fee tail, or any less estate, shall be given by deed or will, to any persons but such as are at the time of the delivery of such deed, or death of the testator, in being, or to their immediate issue or descendants."⁴ A gift, therefore, to the heirs of a living person was void, because his heirs might not be his "immediate issue or descendants."⁵ So a gift to those who should be the heirs of the testator on a future day was void.⁶ The Statute extended to personal property.⁷

Since the first edition the cases on the Connecticut Statute have

Sioux City Terminal R. Co., 69 Fed. Rep. 441; *Sioux City Terminal R. Co. v. Trust Co. of N. America*, 82 Fed. Rep. 124; *Chapman v. Newell*, 146 Iowa, 415.

¹ Ky. Sts. (1903), § 2360. See *Ernst v. Shinkle*, 95 Ky. 608; *Hussey v. Sargent*, 116 Ky. 53; *Brown v. Columbia Finance Co.*, 123 Ky. 775; *Holt v. Deshon*, 126 Ky. 310; *Kasey v. Fidelity Trust Co.*, 131 Ky. 609; *United States Fidelity Co. v. Douglas' Trustee*, 134 Ky. 374; *Patterson v. Patterson*, 135 Ky. 339; *Carter's Trustee v. Gettys*, 138 Ky. 842; *Saulsberry v. Saulsberry*, 140 Ky. 608; *Lindner v. Ehrich*, 147 Ky. 85; *Miller v. Miller*, 151 Ky. 563; *Tyler v. Fidelity Trust Co.*, 164 S. W. Rep. 939 (Ky.); *Johnson v. Johnson*, 79 S. W. Rep. 293 (Ky.); § 121 j, *ante*.

² § 736, *ante*.

³ The statute was obviously suggested by N. Y. Rev. Sts., pt. 2, c. 1, tit. 2, § 15.

⁴ Gen. Sts. (1888), § 2952.

⁵ *Alfred v. Marks*, 49 Conn. 473. In this case, had not Willis M. Marks died before the testator? If so, the devise to his heirs would seem to be to those who answered that description at the death of the testator, and to be therefore good. *Buck v. Lincoln*, 76 Conn. 149. 2 Jarm. Wills (5th ed.) 931-933, 981-992. *Theob. Wills* (5th ed.) 310-313. *Hawkins, Wills*, 99-102.

⁶ *Rand v. Butler*, 48 Conn. 293.

⁷ *Rand v. Butler*, 48 Conn. 293. *Alfred v. Marks*, 49 Conn. 473.

See the decisions in the following section on substantially the same Statute in Ohio.

been numerous;¹ but by the Conn. St. of 1895, c. 249, the statute above quoted is repealed, and the common-law Rule against Perpetuities is now the law in Connecticut.²

§ 740. *Ohio*. — "No estate in fee simple, fee tail, or any lesser estate, in lands or tenements, lying within this State, shall be given or granted by deed or will, to any person or persons but such as are in being, or to the immediate issue or descendants of such as are in being at the time of making such deed or will."³ "Immediate issue or descendants" are not limited to "children," but include all descendants who would take directly by descent. Thus if a man's children are dead, his grandchildren are his "immediate issue or descendants," within the meaning of the Statute.⁴ If a class will be determined within the limits fixed by the Rule against Perpetuities, there seems to be no reason why those of the class who are the immediate descendants of persons living at the testator's death should not take their shares, although some of the class

¹ *Wheeler v. Fellowes*, 52 Conn. 238. *Tappan's Appeal*, Id. 412. *Farnam v. Farnam*, 53 Conn. 261. *Andrews v. Rice*, Id. 566. *Camp v. Crocker*, 54 Conn. 21. *Storr's Agricultural School v. Whitney*, Id. 342. *Anthony v. Anthony*, 55 Conn. 256. *New Haven Young Men's Institute v. New Haven*, 60 Conn. 32. *Leake v. Watson*, Id. 498. *Beers v. Narramore*, 61 Conn. 13. *Landers v. Dell*, Id. 189. *Tarrant v. Backus*, 63 Conn. 277. *Belfield v. Booth*, Id. 299. *Morris v. Bolles*, 65 Conn. 45. *Ketchum v. Corse*, Id. 85. *Johnson v. Edmond*, Id. 429. *Johnson v. Webber*, Id. 501. *St. John v. Dann*, 66 Conn. 401. *Security Co. v. Snow*, 70 Conn. 288. *Hewit v. N. Y. N. H. & H. R. R. Co.*, Id. 637. *Tingier v. Chamberlin*, 71 Conn. 466. *Blakeman v. Sears*, 74 Conn. 516. *Lewis v. Lewis*, Id. 630. *Buck v. Lincoln*, 76 Conn. 149. *White v. Allen*, Id. 185. *Thomas v. Castle*,

Id. 447. *Loomer v. Loomer*, Id. 522. *Gerard v. Ives*, 78 Conn. 485. *Grant v. Stimpson*, 79 Conn. 617. *Lepard v. Clapp*, 80 Conn. 29. *Harmon v. Harmon*, Id. 44. *Cody v. Staples*, Id. 82. *Gerard v. Beecher*, Id. 363. *Bartlett v. Sears*, 81 Conn. 34. *Wolfe v. Hatheway*, Id. 181. *Heald v. Briggs*, 83 Conn. 5. *Carpenter v. Perkins*, Id. 11. *Farnam v. Farnam*, Id. 369. *Russell v. Hartley*, Id. 654. *Pease v. Cornell*, 84 Conn. 391. *Hartford Trust Co. v. Wolcott*, 85 Conn. 134. *Sumner v. Westcott*, 86 Conn. 217. *Wilde v. Bell*, 86 Conn. 610. See 8 Yale L. J. 82.

² *Healy v. Healy*, 70 Conn. 467. *Duggan v. Slocum*, 92 Fed. Rep. 806.

³ Rev. Sts. (1880), § 4200.

⁴ *Turley v. Turley*, 11 Ohio St. 173. See *McArthur v. Scott*, 113 U. S. 340, 383; *Stevenson v. Evans*, 10 Ohio St. 307; *Brasher v. Marsh*, 15 Ohio St. 103.

are not such immediate descendants, and are therefore forbidden by the Statute to take; for the Statute has no reference to time, but only forbids gifts to certain persons.¹ This was so held in *Phillips v. Herron*,² in which case it was further said that such a devise would be good, even if it violated the Rule against Perpetuities. If that is so, the Statute is not in addition to the Rule, but in substitution for it.³ The Statute, it will be observed, is expressly confined to "lands or tenements lying within this State," and therefore cannot be extended to personalty, as the Connecticut statute was.⁴ The Ohio Statute does not apply to gifts for charities.⁵

§ 741. *Pennsylvania*. — The Pennsylvania legislation⁶ has affected only questions of accumulation. It is dealt with in Appendix B.⁷

§ 742. *Alabama*. — "*Extent of time for which lands may be conveyed to certain persons; perpetuity forbidden*. Lands may be conveyed to the wife and children, or children only, severally, successively and jointly; and to the heirs of the body of the survivor, if they come of age, and in default thereof, over; but conveyances to other than the wife and children, or children only, cannot extend beyond three lives in being at the date of the conveyance, and ten years thereafter."⁸ "No leasehold estate can be created for a longer term than twenty years."⁹ Is a lease for thirty years good for twenty years, or void *in toto*?

§ 743. *Indiana*. — "The absolute power of aliening lands shall not be suspended by any limitation or condition whatever, contained in any grant, conveyance, or devise, for a longer period than during

¹ See *McArthur v. Scott*, 113 U. S. 340, 382-384. In *McArthur v. Scott* it was also conceded that the "time of making such will" means the death of the testator. P. 382. See § 231, *ante*.

² 55 Ohio St. 478.

³ But see *Andrews v. Rice*, 53 Conn. 566.

⁴ Compare the decisions in the preceding section on the Connecticut Statute, from which the Ohio Statute was copied.

See also *Gibson v. Moulton*, 2 Disney, 158; *sub nom.* *Gibson v. McNeely*, 11 Ohio St. 131, § 666,

ante. *Dayton v. Phillips*, 28 Weekly Bulletin, 327.

⁵ *O'Neal v. Caulfield*, 8 Ohio Dec. 248.

⁶ 4 Bright. Purd. Dig. (13th ed.) (1910) 4036; 1 Bright. Purd. Dig. (13th ed.) (1910) 594.

⁷ §§ 715-725, *ante*.

⁸ Civil Code (1907), § 3417. See *Lyons v. Bradley*, 168 Ala. 505; *Ashurst v. Ashurst*, 61 So. Rep. 942. The following section of the Code concerns accumulation. Its provisions are given § 726, *ante*.

⁹ Civil Code (1907), § 3418.

the existence of a life, or any number of lives, in being at the creation of the estate conveyed, granted, devised, and therein specified, with the exception that a contingent remainder in fee may be created on a prior remainder in fee, to take effect, in the event, that the person or persons to whom the first remainder is limited shall die under the age of twenty-one years, or upon any other contingency by which the estate of such person or persons may be determined before they attain their full age.”¹ “Where a remainder for life shall be limited on any other than a life or lives in being at the creation of such estate, and the life estates, subsequent to those persons entitled to take life estates, according to the provisions of the last preceding section shall be void; and upon the death of those persons entitled to take the remainder shall take effect, in the same manner as if such void estates had not been created.”²

§ 744. The former of these two sections was suggested by the New York Revised Statutes,³ and is based on the conception of the Rule against Perpetuities, which lies at the root of the New York system; namely, that the Rule is primarily intended to prevent restraints on alienation.⁴ The latter section is also taken from the New York Revised Statutes,⁵ but so clumsily as to make nonsense of it. The statute does not apply to charities.⁶

§ 745. That part of the New York system which affects accumulation has also been adopted, so far, however, only as personal estate is concerned, in Indiana.⁷

¹ 2 Burns' Rev. Sts., § 3998.

² Id. 3999.

³ Pt. 2, c. 1, tit. 2, §§ 15, 16.
See § 747, note, *post*.

⁴ See §§ 118 *a*, 140 *et seq.*, 278 *et seq.*, 736, 737, *ante*; § 748, *post*.

⁵ Pt. 2, c. 1, tit. 2, § 17.

⁶ *Richmond v. Davis*, 103 Ind. 449. Cf. *Commissioners of Rush Co. v. Dinwiddie*, 139 Ind. 128. In *Amos v. Amos*, 117 Ind. 19, a limitation was held to be vested. It is said that if it were contingent it would be void under this statute, but the reason is not obvious. Cf. also *Fowler v. Duhme*, 143 Ind. 248; *Murphey v. Brown*, 159 Ind.

106; *Phillips v. Heldt*, 33 Ind. Ap. 388; *Matlock v. Lock*, 38 Ind. Ap. 281; *Hayes v. Martz*, 173 Ind. 279; *Shriver v. Montgomery*, 103 N. E. Rep. 945 (Ind.). See two articles by H. M. Dowling, Esq., on the Rule against Perpetuities in Indiana. 1 Ind. L. J. 220; 2 Ind. L. J. 18. Mr. Dowling suggests that “and” where it first occurs in c. 82, § 41, was a misprint for “all”; but “and” is allowed to stand in the latest revisions. See also an essay by M. M'D. Townley, Esq., 3 Ind. L. J. 7, 67, 100.

⁷ See § 727, *ante*; § 747, note,

§ 746. *Mississippi*. — "Estates in fee tail are prohibited; and every estate which, but for this statute, would be an estate in fee tail, shall be an estate in fee simple; but any person may make a conveyance or a devise of lands to a succession of donees then living, not exceeding two, and to the heirs of the body of the remainderman, and, in default thereof, to the right heirs of the donor, in fee simple."¹

§ 747. III. *An Elaborate Scheme to be substituted for the Common Law*. — In New York, by the Revised Statutes of 1828, the rule of the common law on the subject of remoteness was abrogated, and an elaborate system established in its stead. This system consists of three parts. (1) Provisions as to the remoteness of interests in land.² (2) Provisions as to the accumulation of rents and profits from land.³ (3) Provisions as to the remoteness of interests in personal property and as to the accumulation of income therefrom.⁴ The provisions are given in a note.⁵

post. Dyson v. Repp, 29 Ind. 482.

¹ Code of 1906, § 2765. On this odd and confused Statute (which, however, is not so odd as it was in an earlier form, Rev. Code of 1871, § 2286), see *Jordan v. Roach*, 32 Miss. 481, 618 *et seq.*; *Cannon v. Barry*, 59 Miss. 289, 300 *et seq.*; *Middlesex Banking Co. v. Field*, 84 Miss. 646; *Thomas v. Thomas*, 97 Miss. 697; *Gully v. Neville*, 55 So. Rep. 289; *Henry v. Henderson*, 101 Miss. 751, reversed on rehearing.

² Rev. Sts. pt. 2, c. 1, tit. 2, §§ 14-21, 23, 24, 36.

³ Rev. Sts. pt. 2, c. 1, tit. 2, §§ 37-40.

⁴ Rev. Sts. pt. 2, c. 4, tit. 4. See 25 Alb. L. J. 172.

⁵ Rev. Sts. pt. 2, c. 1, tit. 2.

"§ 14. Every future estate shall be void in its creation, which shall suspend the absolute power of alienation for a longer period than

is prescribed in this Article. Such power of alienation is suspended, when there are no persons in being, by whom an absolute fee in possession can be conveyed.

"§ 15. The absolute power of alienation shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance of not more than two lives in being at the creation of the estate, except in the single case mentioned in the next section.

"§ 16. A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited, shall die under the age of twenty-one years, or upon any other contingency, by which the estate of such persons may be determined before they attain their full age.

"§ 17. Successive estates for life shall not be limited, unless to persons in being at the creation

§ 748. Upon considering the New York Statutes two remarks suggest themselves. *First.* Those statutes evidently start with

thereof; and where a remainder shall be limited on more than two successive estates for life, all the life estates subsequent to those of the two persons first entitled thereto, shall be void, and upon the death of those persons the remainder shall take effect, in the same manner as if no other life estates had been created.

"§ 18. No remainder shall be created upon an estate for the life of any other person or persons than the grantee or devisee of such estate, unless such remainder be in fee; nor shall a remainder be created upon such an estate in a term for years, unless it be for the whole residue of such term.

"§ 19. When a remainder shall be created upon any such life estate, and more than two persons shall be named, as the persons during whose lives the life estate shall continue, the remainder shall take effect upon the death of the two persons first named, in the same manner as if no other lives had been introduced.

"§ 20. A contingent remainder shall not be created on a term of years, unless the nature of the contingency on which it is limited, be such that the remainder must vest in interest, during the continuance of not more than two lives in being at the creation of such remainder, or upon the termination thereof.

"§ 21. No estate for life shall be limited as a remainder on a term of years, except to a person in being, at the creation of such estate.

"§ 23. All the provisions contained in this Article, relative to future estates, shall be construed to apply to limitations of chattels real, as well as of freehold estates, so that the absolute ownership of a term of years shall not be suspended for a longer period than the absolute power of alienation can be suspended, in respect to a fee.

"§ 24. Subject to the rules established in the preceding sections of this Article, a freehold estate, as well as a chattel real, may be created, to commence at a future day; an estate for life may be created, in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created expectant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this Article.

"§ 36. Dispositions of the rents and profits of lands, to accrue and be received at any time subsequent to the execution of the instrument creating such disposition, shall be governed by the rules established in this Article, in relation to future estates in lands.

"§ 37. An accumulation of rents and profits of real estate, for the benefit of one or more persons, may be directed by any will or deed, sufficient to pass real estate, as follows:

"1. If such accumulation be di-

the theory that the immediate object of the Rule against Perpetuities is to limit restraints upon alienation. This idea has been

rected to commence on the creation of the estate, out of which the rents and profits are to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority:

"2. If such accumulation be directed to commence at any time subsequent to the creation of the estate out of which the rents and profits are to arise, it shall commence within the time in this Article permitted for the vesting of future estates, and during the minority of the persons for whose benefit it is directed, and shall terminate at the expiration of such minority.

"§ 38. If, in either of the cases mentioned in the last section, the direction for such accumulation shall be for a longer term than during the minority of the persons intended to be benefited thereby, it shall be void as respects the time beyond such minority. And all directions for the accumulation of the rents and profits of real estate, except such as are herein allowed, shall be void.

"§ 39. Where such rents and profits are directed to be accumulated for the benefit of infants entitled to the expectant estate, and such infants shall be destitute of other sufficient means of support and education, the chancellor, upon the application of their guardian, may direct a suitable sum out of such rents and profits to be applied to their maintenance and education.

"§ 40. When, in consequence

of a valid limitation of an expectant estate, there shall be a suspense of the power of alienation, or of the ownership, during the continuance of which, the rents and profits shall be undisposed of, and no valid direction for their accumulation is given, such rents and profits shall belong to the persons presumptively entitled to the next eventual estate."

Rev. Sts. pt. 2, c. 4, tit. 4.

"Of Accumulations of Personal Property, and of Expectant Estates in such Property.

"§ 1. The absolute ownership of personal property shall not be suspended by any limitation or condition whatever, for a longer period than during the continuance and until the termination of not more than two lives in being at the date of the instrument containing such limitation or condition; or if such instrument be a will, for not more than two lives in being at the death of the testator.

"§ 2. In all other respects, limitations of future or contingent interests in personal property shall be subject to the rules prescribed in the first Chapter of this Act, in relation to future estates in lands.

"§ 3. An accumulation of the interest money, the produce of stock or other income or profits arising from personal property, may be directed by any instrument sufficient in law to pass such personal property as follows:

"1. If the accumulation be directed to commence from the date

common, and decisions have been based upon it; but the difficulties and confusion arising therefrom have caused the idea to be recognized as erroneous, and the decisions to be overruled or disapproved.¹ This erroneous theory is crystallized in the New York Statutes.

§ 749. *Secondly.* The common-law Rule of Perpetuities grew out of the ordinary usages of the community, and is fitted to them. A will drawn as testators generally wish their wills drawn does not violate the Rule. The limit of lives in being is a natural limit. The Rule strikes down only unusual provisions. But the limit of two lives, fixed by the New York Statute, is an arbitrary limit. It cuts through and defeats the most ordinary provisions. To allow future estates,

of the instrument, or from the death of the person executing the same, such accumulation must be directed to be made for the benefit of one or more minors then in being, or in being at such death, and to terminate at the expiration of their minority.

"2. If the accumulation be directed to commence at any period subsequent to the date of the instrument, or subsequent to the death of the person executing such instrument, it must be directed to commence within the time allowed in the first section of this title, for the suspension of the absolute ownership of personal property, and at some time during the minority of the persons for whose benefit it is intended, and must terminate at the expiration of their minority.

"§ 4. All directions for the accumulation of the interest, income or profit of personal property, other than such as are herein allowed, shall be void; but a direction for an accumulation, in either of the cases specified in the last section, for a longer term than the minority of the persons intended to

be benefited thereby, shall be void only as respects the time beyond such minority.

"§ 5. When any minor, for whose benefit a valid accumulation of the interest or income of personal property shall have been directed, shall be destitute of other sufficient means of support or of education, the chancellor, upon the application of such minor or his guardian, may cause a suitable sum to be taken from the monies accumulated or directed to be accumulated, and to be applied to the support or education of such minor."

These Statutes are here given in their original form. They were re-enacted with alterations, St. 1896, c. 547, 3 Birdseye's General Statutes (1901), 3019, and St. 1897, c. 417, 2 Birdseye, 2631. The original form has been here preserved, both because it is that under which most of the decisions have hitherto been made and also because it is that which has formed the basis for legislation in other States.

¹ See Chap. VII., and §§ 118 a, 140 *et seq.*, 736, 737, 744, *ante*.

and yet to confine them within bounds so purely arbitrary, would seem to be an invitation to litigation. And so the event has proved.

§ 750. The joint effect of these two causes is that in no civilized country is the making of a will so delicate an operation, and so likely to fail of success, as in New York. Before the passage of the Revised Statutes there seems to have been but one case before the courts in that State in which the remoteness of a limitation was called in issue, and that presented only a simple question of construction.¹ From the passage of the Revised Statutes down to the publication of the first edition of this treatise in 1886 there had been over one hundred and seventy reported cases on questions of remoteness.² During the twenty-eight years since 1886, there have been some three hundred cases more, making a total little short of, if not over, four hundred and seventy cases.³ This enormous amount of litigation is perhaps as striking an illustration as could be found of the dangers attending radical legislation. Such legislation is indeed sometimes necessary, but it is not the simple work those engaged in it often suppose.⁴

§ 751. In Michigan, Wisconsin, and Minnesota, the first and second parts of the New York system⁵ have been adopted with scarcely an alteration.⁶ Strangely enough, those States have not

¹ *Moffat v. Strong*, 10 Johns. 12. The case of *Thomson v. Livingston*, 4 Sandf. S. C. 539, was decided in 1851, but arose on a will made in 1825. It was, perhaps, not within the Revised Statutes, but under their influence seems to have been decided wrongly. See § 241, *ante*.

² The names of these cases were given in the first edition. They are now omitted; there seems to be little of profit in a bare unclassified list. Besides, the New York statutes are fully treated in Mr. Chaplin's *Suspension of the Power of Alienation*, 1891, and Mr. Bolles's *Law of the Suspension of the Power of Alienation in New York*, 1891. Cf. also 18 Am. & Eng. Encycl. of Law (1st ed.) 373-380; 30 Cyc. Law & P. 1501; 1 Perry Trusts (6th ed.), §§ 391, 398; 22 Harv.

Law Rev. 520; 10 Columbia Law Rev. 495.

³ See § 609, *ante*.

⁴ In 1 Columbia Law Rev. 224 will be found an able article by George F. Canfield, Esq., on the "New York Revised Statutes and the Rule against Perpetuities." Cf. 1 Tiffany, Real Prop. § 160.

⁵ See § 747, *ante*.

⁶ 3 Mich. Comp. Laws (1897), §§ 8796-8803, 8805, 8806, 8818-8822. 1 Wis. Sts. (1898), §§ 2038-2045, 2047, 2048, 2060-2064. In Wisconsin alienation may be suspended for two lives and twenty-one years thereafter, § 2039. Minn. Revised Laws, §§ 3203-3215, 3319. *Toms v. Williams*, 41 Mich. 552. *Methodist Church of Newark v. Clark*, Id. 730. *Wilson v. O'Dell*, 58 Mich. 533. *Palms v. Palms*, 68

adopted the provisions of the third part of the New York system, that which relates to personal property.¹ But the Supreme Court of Wisconsin has held that the statute has abrogated the common-law Rule against Perpetuities so far as personal property is concerned, and therefore there is absolutely no restraint on the creation of future interests in personalty.² The Indiana Statutes are partly taken from the New York Statutes.³

§ 752. California has borrowed largely from the New York Statutes; it has not, however, restrained the time for creating future estates to two existing lives.⁴ The Constitution of California

Mich. 355. *Ford v. Ford*, 80 Mich. 42. *Farrand v. Petit*, 84 Mich. 671. *Dean v. Mumford*, 102 Mich. 510. *Trufant v. Nunneley*, 106 Mich. 554. *Defreese v. Lake*, 109 Mich. 415. *Mullreed v. Clark*, 110 Mich. 229. *Petit v. Flint, &c. R. R. Co.*, 114 Mich. 362. *State v. Holmes*, 115 Mich. 456. *Downing v. Birney*, 117 Mich. 675. *Torpy v. Betts*, 123 Mich. 239. *FitzGerald v. Big Rapids, Id.* 281. *Niles v. Mason*, 126 Mich. 482. *Casgrain v. Hammond*, 134 Mich. 419. *Van Driele v. Kotvis*, 135 Mich. 181. *Cole v. Lee*, 143 Mich. 267. *Foster v. Stevens*, 146 Mich. 131. *Hull v. Osborn*, 151 Mich. 8. *McInerny v. Haase*, 163 Mich. 364. *Lounsbury v. Trustees of Burial Association*, 170 Mich. 645 (cf. 10 Mich. Law Rev. 31, 36). *Van Gallow v. Brant*, 168 Mich. 642. *Dodge v. Williams*, 46 Wis. 70. *De Wolf v. Lawson*, 61 Wis. 469. *Scott v. West*, 63 Wis. 529. *Webster v. Morris*, 66 Wis. 366. *Ford v. Ford*, 70 Wis. 19; 72 Wis. 621. *Fadness v. Braunborg*, 73 Wis. 257. *Saxton v. Webber*, 83 Wis. 617. *Hughes v. Hughes*, 91 Wis. 138. *Beurhaus v. Cole*, 94 Wis. 617. *Tyson v. Tyson*, 96 Wis. 59. *Harrington v. Pier*,

105 Wis. 485. *Webber v. Webber*, 108 Wis. 626. *Will of Kopmeier*, 113 Wis. 233. *Holmes v. Walter*, 118 Wis. 409. *Adelman's Will*, 138 Wis. 120. *Harrington's Will*, 142 Wis. 447. *Kavanaugh's Will*, 143 Wis. 90. *Eggleston v. Swartz*, 145 Wis. 106. *Stark's Will*, 149 Wis. 631. *Simpson v. Cook*, 24 Minn. 180. *Atwater v. Russell*, 49 Minn. 22, 57. *In re Tower's Estate, Id.* 371. *Lane v. Eaton*, 69 Minn. 141. *Owatonna v. Rosebrock*, 88 Minn. 318. *Rong v. Haller*, 109 Minn. 191. *Buck v. Walker*, 115 Minn. 239. *Young Men's Christ. Assoc. v. Horn*, 120 Minn. 404.

¹ *Toms v. Williams*, 41 Mich. 552, 562. *Dodge v. Williams*, 46 Wis. 70, 95 *et seq.* *Penny v. Croul*, 76 Mich. 471. *De Wolf v. Lawson*, 61 Wis. 469, 474.

² *Becker v. Chester*, 115 Wis. 90. *Danforth v. Oshkosh*, 119 Wis. 262. See § 265, *ante*.

³ See §§ 743-745, *ante*.

⁴ Civil Code, §§ 715-716, 722-725, 770-777, 1313. *Goldtree v. Thompson*, 79 Cal. 613. *Whitney v. Dodge*, 105 Cal. 192. *In re Walkerly*, 108 Cal. 627. *Estate of Hendy*, 118 Cal. 656. *Estate of*

(1849)¹ provides that "no perpetuities shall be allowed except for eleemosynary purposes."² North Dakota and South Dakota have adopted the California Statutes on these subjects, bodily,³ and Idaho and Montana have taken some provisions from the same source.⁴

D.

FOREIGN LAW.

I. SCOTCH LAW.

§ 753. *Land*. — The owner of land may tailzie (i. e. entail) it by a simple destination. "That sort [of entail] is called a *simple destination* where the persons called to the succession are in the deed substituted one after another, but without any restraint laid upon the members or heirs of entail as they come to succeed, that they shall not alter the course of succession settled by the maker. They have therefore this only legal effect, that the order of succession contained in the entail is to be observed so long as no alteration is made by any of the heirs succeeding to the lands. But as these

Cavarly, 119 Cal. 406. Atlantic Trust Co. v. Woodbridge Canal Co., 86 Fed. Rep. 975. Crew v. Pratt, 119 Cal. 139. Sacramento Bank v. Alcorn, 121 Cal. 379. Camp v. Land, 122 Cal. 167. Toland v. Toland, 123 Cal. 140. Estate of Steele, 124 Cal. 533. Staacke v. Bell, 125 Cal. 309. Estate of Fair, 132 Cal. 523. Nellis v. Rickard, 133 Cal. 617. Blake-man v. Miller, 136 Cal. 138. Estate of Pforr, 144 Cal. 121. Estate of Lux, 149 Cal. 200. Estate of Campbell, Id. 712. Estate of Haines, 150 Cal. 640. Estate of Fay, 5 Cal. Ap. 188. Campbell v. Karvannanako, 152 Cal. 201. Estate of Heberle, 155 Cal. 723. Hornung v. Sedgwick, 164 Cal. 629. Estate of Budd, 166 Cal. 286. Es-

tate of Coleman, 138 Pac. Rep. 992 (Cal.).

¹ Art. 11, § 16.

² See Estate of Hinckley, 58 Cal. 457, 470 *et seq.*; Estate of Robinson, 63 Cal. 620; People v. Cogswell, 113 Cal. 129; Estate of Gay, 138 Cal. 552; Estate of Merchant, 143 Cal. 537; §§ 730, 731, *ante*.

³ N. Dak. Civ. Code (1905), §§ 4744-4746, 4771, 4772, 4872, 4873. Penfield v. Tower, 1 N. Dak. 216. Hagen v. Sacrison, 19 N. Dak. 160. S. Dak. Civ. Code, §§ 224-226, 251, 252, 352-354.

⁴ Idaho, Civ. Code (1901), §§ 2364, 2367, 2369. Montana, Civ. Code (1907), §§ 4463-4465, 4492.

Cf. Dist. of Col. Code, § 1023.

heirs are laid under no restraint in the exercise of their property, they are unlimited fiars, and consequently may either bring back the succession to the heirs-at-law or carry it to any other order of heirs at pleasure, in the same manner that the maker himself could have done.”¹

§ 754. Deeds of entail sometimes contain prohibitory, irritant, and resolute clauses. Prohibitory clauses forbid the doing of certain acts by the successive owners of the estate, such as alienation or changing the order of succession. Irritant clauses avoid the acts prohibited. By resolute clauses the interests of owners doing the prohibited acts are forfeited. It was questioned whether at common law such clauses were valid;² but by St. 1685, c. 22, the Parliament “statutes and declares that it shall be lawful to his Majesty’s subjects to tailzie their lands and estates, and to substitute heirs in their tailzies, with such provisions and conditions as they shall think fit, and to effect the said tailzies with irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the said lands, or any part thereof, or contract debt, or do any other deed whereby the samen may be apprized, adjudged, or evicted from the other substitute in the tailzie, or the succession frustrate or interrupted, declaring all such deeds to be in themselves null and void.” But to have this effect the deeds had to contain irritant and resolute clauses, and had to be produced in court and recorded.

§ 755. Life rents, corresponding to estates for life in the English law, and annuities charged on land could be granted only to specified persons; whether they could be granted to such persons before their birth, and if so within what limits, does not seem entirely clear.³ No other kind of future interest in land appears to be known to the Scotch law, save that some conditions subsequent are valid in feudal grants.⁴

§ 756. By St. 11 & 12 Vict. (1848), c. 36, owners of entailed estates

¹ 2 Ersk. Inst., book 3, tit. 8, § 22 (Nicolson’s ed. 1871), p. 910.

² 2 Ersk. Inst., book 3, tit. 8, § 25, pp. 912, 913.

³ 1 M’Laren, Wills and Succession (3d ed.), § 561. Bell’s Principles (9th ed.), § 1716. Erskine

v. Wright, 8 Dunlop, C. of Sess. 863. *Strathmore v. Strathmore*, 5 Wils. & Sh. 170, 180, note, 194–198. *McNair v. McNair*, Id. 187, note; 19 Mor. Dict. 16210.

⁴ Bell’s Principles (9th ed.), § 861.

in Scotland are empowered to disentail, although the estates are held in trust for them; and by § 48 of the Statute it is enacted that "it shall be competent to grant an estate in Scotland limited to a liferent interest in favour only of a party in life at the date of such grant."¹

§ 757. *Movables*. — Substitutions in movables (corresponding to executory limitations in the English law), if the movables are not placed in trust, are defeasible by the owner for the time being.² Movables might, however, be vested in trustees, to be enjoyed by an indefinite series of persons for life; nor does there seem to have been any limit on the time during which this might last.³ "In Scotland the law, instead of discouraging perpetuities, gives them all manner of encouragement, and instead of confining the time to the lives in being and twenty-one years, with the time of gestation beyond, permits you, in every case, to tie up property for ever and ever."⁴

§ 758. This is now altered by St. 31 & 32 Vict. (1868), c. 84, § 17, which provides that "from and after the passing of this Act, it shall be competent to constitute or reserve, by means of a trust or otherwise, a life rent interest in moveable and personal estate in Scotland in favour only of a party in life at the date of the deed constituting or reserving such life rent."

§ 758 *a*. A conveyance of property could be made on condition precedent, or made to take effect at a future day, and as a conveyance could be to an uncertain person, there would seem to have been no obstacle to a conveyance to an unborn person.

§ 759. *Accumulation*. — The Scotch common law put no limit to the time during which accumulation might continue,⁵ but it has been intimated that accumulation might be directed "to such an excess as would permit a court to interfere; but the limit which might justify that interference was difficult to lay down."⁶ In the case of

¹ The statutes concerning Scotch entails are collected and annotated in Rankine's *Law of Land Ownership in Scotland* (3d ed.) 935-1045. See Lewis, *Perp.* c. 34.

² *M'Dowall v. M'Gill*, 9 Dunlop, C. of Sess. 1284.

³ *Suttie v. Suttie*, 18 Sc. Jur. 442. *McNair v. McNair*, 5 Wils. & Sh. 187, note; 19 Mor. Dict.

16210. 1 M'Laren, *Wills and Succession* (3d ed.), § 564.

⁴ *Per* Lord Brougham, C., in *Strathmore v. Strathmore*, 5 Wils. & Sh. 170, 193.

⁵ *Strathmore v. Strathmore*, 8 Sh. 530; 5 Wils. & Sh. 170. 1 M'Laren, *Wills and Succession* (3d ed.), §§ 566, 567.

⁶ 8 Sh. 538.

Strathmore v. Strathmore directions that rents should be accumulated for thirty years were held valid.

§ 760. The Thellusson Act¹ extends to Scotland,² but the third section provides: "That nothing in this Act contained shall extend to any disposition respecting heritable property within that part of Great Britain called Scotland."³ The St. of 11 & 12 Vict. (1848), c. 36, § 41, however, repeals the third section of the Thellusson Act, above quoted, and declares that the Act "shall in future apply to heritable property in Scotland."⁴ It has been held that this § 41 does not render the Thellusson Act applicable to accumulations of the income of real estate made after 1848, under the provisions of a deed going into operation before that date.⁵

II. ROMAN LAW.

§ 761. Usufructs might (by will at least) be created on condition precedent or to begin at a future time, *ex certo tempore*.⁶ It is said in the Digest that a usufruct may be granted to a man and his heirs,⁷ and that the heirs take a distinct usufruct, "*licet diversi sint fructus*."⁸ John Voet⁹ says that a usufruct so granted expires with the heir, and does not pass to the heir of the heir. "*Tametsi autem heredis appellatione etiam heredum heredes in infinitum vulgo intelliguntur, attamen hic primi tantum heredes censeri debent comprehensi, ne alioquin inutilis proprietario esset proprietas, usufructu in perpetuum recedente;*" and he relies on a Constitution of Justinian, in which it is declared that if a legacy is burdened with a usufruct in favor of the testator's heir,

¹ 39 & 40 Geo. III. (1800), c. 98; § 686, note, *ante*.

² The Scotch cases arising under its provisions are cited App. B, *ante*.

³ On what is a "disposition respecting heritable property," see *Ogilvie v. Kirk* Session of Dundee, 8 Dunlop, C. of Sess. 1229, § 714, *ante*.

On the conflict between the English and Scotch law, see *Fordyce v. Bridges*, 2 Phil. 497, 515, § 264, *ante*; *Macpherson v. Stewart*, 28 L. J. Ch. 177, 32 L. T. 143, §§ 259, note, 264, note, *ante*.

⁴ Cf. *Moon v. Moon*, 2 Rettie, C. of Sess. 201.

⁵ *Keith v. Keith*, 19 Dunlop, C. of Sess. 1040. *McLarty v. McLarty*, 2 Macph. 849.

⁶ D. 7, 1, 4. D. 7, 1, 34. D. 7, 1, 54. D. 7, 3, 1. D. 10, 2, 16, 2. D. 36, 2, 2. D. 36, 2, 5, § 1. *Vat. Frag.* 48-50. 1 *Demangeat*, *Cours de Dr. Rom.* 510, 511.

⁷ D. 7, 4, 5, pr.

⁸ D. 45, 1, 38, § 12.

⁹ *Ad. D.* 7, 4, 1.

this usufruct shall come to an end at the death of the heir, and not pass to his heir.¹ But, as Windscheid remarks,² in this case it was only just that the reservation should be construed thus strictly, in order that the legacy might have some effect, and that the Constitution cannot be considered as prohibiting the devise of a usufruct to a man and his heirs. Windscheid adds that though to allow a usufruct to go to heirs was in contradiction to the conception of a usufruct as a personal right, and to call the heir's interest a new usufruct was merely a formal reconciliation with the original doctrine, yet that this step was a necessary consequence of the other personal servitudes, the *emphyteusis* and the *superficies*, having become heritable.³ In the case of annuities given by will to a man and his heirs, Justinian enacted "*eorum exactionem omnibus heredibus et heredum heredibus conservari pro voluntate testatoris*;"⁴ it does not, however, appear but that such annuity might be alienated or surrendered by the person entitled to it for the time being.

§ 762. Independently of *fideicommissa*, the only future substitution allowed (*substitutio pupillaris*) was that a *paterfamilias* might, in his will, name the heir to his child in case the child should die before the age of puberty.⁵ But by means of *fideicommissa* future substitutions were made general.⁶

¹ C. 3, 33, 14.

² 1 Pand. § 215, note 7.

³ See also 1 Dernburg, Pand., § 246. But cf. Pfersche, 8 Grünhut's Zeitschr. 526.

⁴ C. 6, 37, 22.

⁵ I. 2, 16, pr. Legacies, however, might be on condition precedent. And an insane child or grandchild in whose place there had been a *substitutio exemplaris* took the property on recovering its reason. C. 6, 26, 9.

⁶ See examples from the Digest collected in Hunter, Rom. Law (3d ed.), 823. On the *fideicommissum familiæ relictum*, see the *Donatio Flavii Syntrophii* as given in Bruns, Fontes Jur. Rom. Ant. (5th ed.) 253; Lewis, Familienfideicommis.

§ 1; and Rosin in 32 Ihering, Jahrb. für Dog. 323, 391 *et seq.* In the 159th Novel, Justinian decreed in the case of a particular will (set forth in the Novel) that property which the testator had provided should remain in his family forever, and which had, in fact, passed by substitution through four hands and generations, was freely alienable; but there has been much question whether it was intended by this Novel to lay down any general rule, and if so, what that general rule was. Cujac. Novell. Expos. ad loc. Domat, p. 2, l; 5, t. 3, § 3819. 3 Windscheid, Lehrbuch des Pandektenr. § 637. 3 Brinz. Pand. § 423, note 27. 3 Dernburg, Pand. § 114, note 9. Lewis, Famili-

III. FRENCH LAW.

§ 763. To take by gift or legacy, the donee or legatee must be begotten at the time of the gift or of the testator's death.¹ Property may be conveyed *inter vivos* or by will on condition precedent,² and so may a usufruct.³ And the right to a legacy on condition may, when the condition is certain to be fulfilled,⁴ pass to the heir of the legatee, but not when the fulfilment of the condition is uncertain.⁵ The right of return (*droit de retour*) of gifts upon the death of the donee, or of the donee and his descendants, is valid in favor of the donor alone, but not of the donor and his heirs.⁶

§ 764. A usufruct comes to an end with the death of the usufructuary;⁷ but a usufruct may be granted to two or more persons in succession.⁸ A usufruct cannot be given or bequeathed to unbegotten heirs;⁹ but it may be acquired for value (*établi à titre onéreux*) for unbegotten heirs; it seems, however, that it must expire with the immediate heirs, and not pass to their heirs.¹⁰

enfideicommis. § 24, pp. 439 *et seq.*

For the German Familienfideicommissen, see 1 Holzendorf, Rechtslex., *sub voce*; Lewis, Das Recht des Familienfideicommisses.

¹ Cod. Civ. § 906. But by a marriage contract a person may dispose of the whole or part of such property as he may leave at his death, for the benefit of the husband and wife, or of the issue of the marriage in case the donor survives the husband or wife. Cod. Civ. §§ 1082, 1084. As to substitutions when the person substituted is unborn, see § 764, *post*.

² See 13 Journ. Comp. Leg. N. S., Part 1, 52.

³ Cod. Civ. § 580.

⁴ E. g. when a legacy to A. is to be paid upon the death of B. See § 201, note, *ante*.

⁵ Cod. Civ. §§ 1040, 1041.

⁶ Cod. Civ. § 951. 8 Duranton,

Cours de Dr. Fr. § 487. 4 Zachariä, Handb. d. franz. Civilr. (8th ed.), § 710. 8 Aubry-Rau., Cours de Dr. Civ. Fr. (4th ed.), § 740.

⁷ Cod. Civ. § 617. So with *usus* and *habitation*. Cod. Civ. § 625.

⁸ 4 Duranton, § 491. Lebon v. Pénavaire, 12 Dalloz, Jur. du Royaume, 190, note. 1. 2 Aubry-Rau, § 228.

⁹ Cod. Civ. § 906. See § 763, *ante*.

¹⁰ See § 761, *ante*; 3 Toullier, Droit Civ. Fr. § 447; 4 Duranton, § 491. Duranton, *loc cit.*, says that by express stipulation a usufruct may be acquired *à titre onéreux* for the heir's heir, *sed quære*. The prevailing opinion now seems to be, that a usufruct cannot be *établi à titre onéreux* for unbegotten heirs. 42 Dalloz, Rép. de Lég. Usufruct, § 103. 10 Demolombe, Code Nap., § 248. 6 Laurent, Dr. Civ. Fr., § 354. 2 Aubry-Rau, § 228, note

§ 765. The only way by which, in France, property can be given to an unborn person is the following substitution, which is the sole substitution allowed by the French law: By gift *inter vivos* or by will a donor or testator may give property to his child, or if he has no child, to his brother or sister, with a provision that, on the death of the donee or legatee, the property shall go absolutely and without condition to the children of such donee or legatee.¹ If a gift is made with an illegal substitution, not only the substitution but the original gift is invalid.²

IV. LAW OF LOUISIANA.

§ 766. To take by gift or legacy, the donee or legatee must be begotten at the time of the gift or of the testator's death.³ Property may be conveyed *inter vivos* or by will on condition precedent, and so may a usufruct.⁴ And the right to a legacy on condition may, when the condition is certain to be fulfilled, pass to the heir of the legatee, but not when the fulfilment of the condition is uncertain.⁵ The right of return of gifts upon the death of the donee, or of the donee and his descendants, is valid in favor of the donor alone.⁶

3. On emphyteusis, see Law of June 25, 1902; 1 Planiol, *Droit Civil* (6th ed.), §§ 2989 *et seq.*

¹ Cod. Civ., §§ 896, 897, 1048 *et seq.* The law of May 17, 1826, extending the right of substitution to the second degree was repealed by the law of May 7, 1849; and *majorats*, by which, in accordance with the Code Civil, § 896, property might be entailed with an hereditary title, were abolished by the law of May 12, 1835.

² Cod. Civ. § 896. 5 Toullier, *Droit Civ. Fr.*, §§ 12-14. The Courts will try to construe a gift to one person with a gift over to another as a gift of the usufruct and a gift of the naked property, which is allowed, Cod. Civ., § 899, and not a gift with a substitution,

5 Toullier, §§ 43-50; cf. 3 Planiol, *Droit Civil* (6th ed.), §§ 3290 *et seq.*; or as a gift on condition, *Id.* § 3295; Lambert, *L'Exhérédation*, §§ 771-882; Sirey (1892), Part 2, 89; but where the gift over is to an unborn person this cannot be done, § 763, *ante*.

Cf. article by Mr. H. Sheldon Amos, *Perpetuities in French Law*, 13 *Journ. Comp. Leg. n. s.*, Part 1, 47.

³ La. Rev. Code (1870), art. 1482. *Sevier v. Douglas*, 44 La. An. 605.

⁴ La. Rev. Code, art. 542.

⁵ La. Rev. Code, art. 1698, 1699. See § 201, note, *ante*.

⁶ La. Rev. Code, art. 1534. See *Duplessis v. Kennedy*, 6 La. 231. These provisions are identical with

§ 767. "The donor is permitted to dispose, for the advantage of any other person, of the enjoyment or usufruct of the immovable property given, but cannot reserve it for himself."¹ If the usufruct is reserved to the donor, the whole donation is null.² "The right of the usufruct expires at the death of the usufructuary."³ Successive usufructs may be given to living persons.⁴

§ 768. "Substitutions and *fidei commissa* are and remain prohibited. Every disposition by which the donee, the heir, or legatee is charged to preserve for or to return a thing to a third person is null, even with regard to the donee, the instituted heir or the legatee."⁵ "The disposition, by which a third person is called to take the gift, the inheritance or the legacy, in case the donee, the heir or the legatee does not take it, shall not be considered a substitution and shall be valid."⁶ The same shall be observed as to the disposition *inter vivos* or *mortis causa*, by which the usufruct is given to one, and the naked ownership to another."⁷

§ 768 a. La. St. 1882, Act 124, provides that nothing in the laws of the State "relative to substitutions *fidei commissa* or trust dispositions" shall be deemed to apply to or in manner affect donations *inter vivos* or *mortis causa* to trustees for educational, charitable, or literary purposes.⁸

§ 769. In many cases dispositions have been declared null as being gifts with substitutions.⁹

those of the French Code Civil.
See § 763, *ante*.

¹ La. Rev. Code, art. 1533. The prohibition of the reservation of a usufruct to the donor is not in the French law. See Code Civil, § 949. *Dawson v. Holbert*, 4 La. An. 36.

² *Martin v. Martin*, 15 La. An. 585.

³ La. Rev. Code, art. 606. See § 764, *ante*.

⁴ *McCalop v. Stewart*, 11 La. An. 106.

⁵ La. Rev. Code, art. 1520. See *Beaulieu v. Ternoir*, 5 La. An. 476; *Succession of Beauregard*, 49 La. An. 1176.

⁶ See *Cochrane's Succession*, 29 La. An. 232.

⁷ La. Rev. Code, arts. 1521, 1522.

⁸ See *Burke's Succession*, 51 La. An. 538. But cf. *Female Orphan Soc. v. Young Men's Christ. Ass.*, 119 La. 278.

⁹ *Cloutier v. Lecomte*, 3 Mart. 481, 485. *Farrar v. M'Cutcheon*, 4 Mart. N. S. 45. *Arnaud v. Tarbe*, 4 La. 502. *Rachal v. Rachal*, 1 Rob. 115. *Harper v. Stanbrough*, 2 La. An. 377. *Colvin v. Nelson*, 4 La. An. 544. *Roy v. Latiolas*, 5 La. An. 552. *Wailles v. Daniell*, 14 La. An. 578. *Hoggatt v. Gibbs*, 15 La. An. 700. *Marshall v. Pearce*,

§ 770. But the Louisiana courts declared that where a donation could be construed as the gift of a usufruct and of the naked property instead of as a case of substitution, it should be done, in order to carry out the donor's or testator's wishes; as, for instance, when there was a gift to A. for life, and on his death an absolute gift to persons who were *in esse* at the time of the gift.¹ The distinction between this class of cases and those cited in the preceding section will be found best stated in *Rachal v. Rachal*.²

§ 771. The case of *Provost v. Provost*³ seems to involve a departure from the doctrine above stated;⁴ and in *Marshall v. Pearce*⁵ the Supreme Court (Bermudez, C. J., dissenting *totis viribus*) reversed the previous policy of the Court, and held that a gift of property to A. to have and to hold during her life, and after her death to B., was void as a substitution. The decision is based on the distinction alleged to exist under the definitions of the Louisiana Code between imperfect ownership for life and usufruct.⁶

§ 772. It is perhaps hardly becoming in a common-law lawyer to express an opinion upon such a question, but it certainly seems undesirable to have the sustaining of a will depend upon whether the testator has created a usufruct or an imperfect ownership for life. The Court admit that there is no such distinction in the French Code Civil; nor, they might have added, in the Roman law. It is difficult to believe that the lawyers who framed the Louisiana

34 La. An. 557. Herber's Succession, 128 La. 111. Le Blanc's Succession, Id. 1055. See Ducloslange v. Ross, 3 La. An. 432; Murphy v. Cook, 10 La. An. 572; Whitehead v. Watson, 19 La. An. 68; Steven's Succession, 36 La. An. 754. Cf. Franklin's Succession, 7 La. An. 395; Groves v. Nutt, 13 La. An. 117, 122, 123; Perin v. McMicken, 15 La. An. 154; Michon's Succession, 30 La. An. 213.

¹ Ducloslange's Succession, 4 Rob. 409. Fisk v. Fisk, 3 La. An. 494. Roy v. Latiolas, 5 La. An. 552. Cecile v. Lacoste, 8 La. An. 142. Baker's Succession, 10 La. An. 28. McCalop v. Stewart, 11

La. An. 106. Hasley v. Hasley, 25 La. An. 602. Law's Succession, 31 La. An. 456. Succession of Auld, 44 La. An. 591. Succession of Good, 45 La. An. 1392.

² 1 Rob. 111, 118. See also Cole v. Cole, 7 Mart. n. s. 414; Nimmo v. Bonney, 4 Rob. 176; Michel v. Beale, 10 La. An. 352.

³ 13 La. An. 574.

⁴ In Anderson v. Pike, 29 La. An. 120, the gift after the life interest was not absolute.

⁵ 34 La. An. 557.

⁶ See La. Rev. Code, arts. 490, 533; Succession of Auld, 44 La. An. 591; Benson v. Cozine, 3 Id. 913.

Code had any actual intention of introducing so bewildering a subtlety.¹

V. LAW OF TEXAS.

§ 773. By the Spanish Law of 1821, which was in force in the Republic of Texas, substitutions by way of *fidei commissa* were abolished;² but by an Act of Texas in 1840³ the Spanish law was abolished and the common law introduced,⁴ and therefore it is to be presumed that the common law as to remoteness of limitations prevails in Texas, except so far as modified by the provision of the Constitution of 1876,⁵ that "perpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed."⁶

E.

DETERMINABLE FEES.

§ 774. What is said in the second chapter upon the effect of the Statute *Quia Emptores* on the possibility of creating determinable fees, has called forth criticisms from two high quarters, one by H. W. E. (whom I do not think I can be wrong in identifying with Sir Howard Warburton Elphinstone) in a review of the present book,⁷ and the other by my late learned friend, Mr. H. W. Challis,⁸ in reply to a communication of mine to the *Law Quarterly Review*.⁹ Mr. Challis's remarks were first printed in the same volume of the *Law Quarterly Review*,¹⁰ but were republished as Appendix IV. to the second edition of his valuable book on the Law of Real Property. These criticisms are mutually destructive.

¹ "They [the Louisiana Codes] were written by lawyers, who mixed with the positive legislation, which they contained, definitions seldom accurate, and points of doctrine always unnecessary." Ellis v. Prevost, 13 La. 230, 236. See Dépas v. Riez, 2 La. An. 30, 41 *et seq.*

² Gortario v. Cantu, 7 Tex. 35.

³ Pasch. Dig., art. 978.

⁴ See Bufford v. Holliman, 10 Tex. 560, 571.

⁵ Art. 1, § 26.

⁶ § 730, *ante*.

⁷ 2 Law Quart. Rev. 394.

⁸ I cannot mention Mr. Challis without expressing my sense of the great loss the literature of the law has suffered by his death.

⁹ 3 Law Quart. Rev. 399.

¹⁰ P. 403.

§ 775. Sir Howard Elphinstone says that my "reasoning against the possibility of reserving a right of reverter to the grantor is conclusive," but that the truth is "that when the limitation comes to an end the land will fall into the hands of the lord of the fee by a right somewhat in the nature of an escheat." But Mr. Challis thinks that it is the grantor and not the lord who has the possibility of reverter.¹ The inability of two such distinguished writers to agree who has the possibility of reverter is perhaps an argument in favor of the view that there is no possibility of reverter at all.

§ 776. I. *Sir Howard Elphinstone's theory that the possibility of reverter is in the lord.* Against this theory it may be urged: (1) It has never been, so far as I am aware, before stated or suggested by any judge, counsel, or writer. (2) In several of the *dicta* of judges in which determinable fees have been spoken of as estates which can still be created, it is said that the possibility of reverter is in the grantor. Thus Choke, J.: "As if I give land to a man to have to him and his heirs in fee so long as John A'Down has issue of his body, in that case the feoffee will hold of his lord, &c.; yet if John A'Down dies without heir of his body, &c., in that case I may well enter, &c. But not by escheat, &c., but because the feoffment is determined."² So Houghton, J.: "If a man give or devise lands to one and his heirs so long as J. S. hath issue of his body, he shall not by recovery bind him who made this gift, without making him a party by way of vouchee."³ Again Treby, C. J., and Powell, J.: "A man may have a possibility of reverter, where he cannot limit a remainder; as if A. gives lands to B. and his heirs during the time that such an oak shall grow, he hath a possibility of reverter, though no remainder can be limited."⁴ (3) The right to enter for condition broken did not pass to the lord. (4) Land given in frankalmoign could be held only of the donor, and the Statute *Quia Emptores* was construed not to have changed this; and so the granting of an estate in frankalmoign became impossible to a subject.⁵ (5) Before the Statute *De Donis* estates in fee simple conditional seem to have been held of the

¹ Real Prop. (3d ed.) 437.

² 7 Edw. IV. 12 a.

³ Pells v. Brown, Cro. Jac. 590, 593.

⁴ Ayers v. Falkland, 1 Ld.

Raym. 325; and cf. Lord Hardwicke, C., in *Lethieullier v. Tracy*, 3 Atk. 774.

⁵ Lit. §§ 140, 141.

donor; and after that statute a provision attached to an estate tail that it should be held of the donor's lord was void.¹

§ 777. II. *Mr. Challis's theory that the possibility of reverter is in the feoffor.* The only argument which Mr. Challis adduced, and therefore the only one I can meet, was this: The Statute *Quia Emptores*, in its third section, provides "that it extendeth but only to lands holden in fee simple," and therefore estates in fee simple determinable are excluded from its operation; that is, a determinable fee is held of the feoffor just as an estate tail is held of the donor. But is not this as novel a theory as that of Mr. Sanders? Has not the common notion been that a determinable fee is held of the feoffor's lord, precisely as an estate on condition subsequent is held of such lord? Mr. Justice Choke thought so: "As if I give land to a man to have to him and his heirs in fee so long as John A'Down has issue of his body, in that case the feoffee will hold of his lord, &c., yet if John A'Down dies without heirs of his body, &c., in that case I may well enter."² I have looked in vain for any expression of opinion to the contrary. Suppose A. makes a feoffment of Blackacre to B. and his heirs until C. goes to Rome, and B., being a bastard, dies without issue, and suppose C. has died in the lifetime of B. without going to Rome, so that there is now no limitation upon the estate, does the tenure change? Before C.'s death was the land held of A., and is it now held of A.'s lord? The fact that such difficulties did not occur to the profession shows how perfunctory was the consideration given to the theory of determinable fees.

§ 778. Mr. Challis says "that a cardinal result of the Statute of *Quia Emptores* should be left to be discovered by Sanders" is "extremely improbable, and even cousin german to impossible," and that "in reading his [Sanders's] writings I have always felt like a traveller in a strange land, where everything wears an odd and unexpected appearance." This unfamiliar aspect of certain legal writers is a not uncommon experience. But it is largely a subjective matter. Mr. Sanders strikes Mr. Challis as queer. I do not think he ever produced that impression on me. On the other hand in reading Mr. Preston, to whom Mr. Challis pays as much

¹ 2 Inst. 505. But see Marton v. Prior of Gisburn, 2 Edw. II. 114, 19 Seldon Soc. 21

² 7 Edw. IV. 12 a.

³ Real Prop. (3d ed.) 437.

deference as so independent a writer can, I feel in fairyland, a very tedious fairyland.

§ 779. If the effect of the Statute *Quia Emptores* on possibilities of reverter had been a burning question, either practically or theoretically, for over six hundred years, it is indeed extremely unlikely that it should have been reserved for Mr. Sanders to discover the true doctrine. But, so far as we know, the question never came up practically, and it was so little considered theoretically that the highest authorities at the present day cannot find materials enabling them to come to an agreement upon the most fundamental matter concerning it. Under these circumstances it is not, I submit, strange, that a clever, original man should, even in the nineteenth century, hit upon a plausible effect that could be given to a statute which had never occurred to any one before. For the question of determinable fees never came up practically; it was little the disposition of English lawyers to trouble themselves about questions which did not come up practically; and when determinable fees were spoken of in court or in treatises it was rather by the way "of ornament to the discourse," as Lord Coke would say, than as furnishing really valuable analogies.

§ 780. Mr. Sanders's shoulders, however, have not to support alone the weight of the doctrine that there are now no such things as determinable fees. Chief Justice Anderson, in his own reports, although not referring to the Statute *Quia Emptores*, states emphatically that "if land be given to one and his heirs so long as J. S. or his heirs may enjoy the manor of D., these words (so long) are utterly vain and idle, and do not abridge the estate," and then goes on to point out clearly the distinction between determinable and base fees.¹ And Mr. Sanders has had a most respectable following,—the Commissioners on Real Property, Mr. Leake, Mr. Marsden, Sir Frederick Pollock;² and in *Collier v. Walters*³ the notion that an estate until a testator's debts were paid was a determinable fee received a crushing condemnation which was not based on anything peculiar to the limitation.

§ 781. When we say that the Statute *Quia Emptores* did or did not put an end to determinable fees, we are not inquiring into the

¹ Christopher Corbet's Case, 2 And. 134; see § 35, *ante*.

² See § 36, *ante*.

³ L. R. 17 Eq. 252; see § 37, *ante*.

truth of an alleged physical fact, as, for instance, whether in the year 1289 John Stiles killed Robin A'Green. What is meant is that the Courts would or would not after the Statute have allowed such determinable fees. Of this we know nothing, and very likely never shall know anything. The real question we are considering is not, however, an historical one, but it is what is the way in which courts do and ought to decide this matter at the present day; and I submit the proper way to approach it is this:

Future contingent remote limitations are universally disapproved at the present day; courts and legislatures alike condemn them.

There is an alleged exception in the case of possibilities of reverter after determinable fees.

There is no rational distinction in this respect between possibilities of reverter and other contingent remote limitations.

By the theory of the common law, decisions of the courts made in earlier times and since followed, will be respected, even although they would not now be made, or even although they introduce anomalies into the law.

There have been no such decisions as to determinable fees.

It is practicable to give a reasonable construction to the Statute *Quia Emptores* which will do away with the supposed objectionable exception.

A court is justified in adopting this construction, although it may not feel sure that the judges of the thirteenth century would have done so. Being fortunate in not being hampered with an antique and narrow precedent they ought to use their freedom intelligently, and not impose irrational and arbitrary exceptions which they can avoid.

§ 782. A serious objection to the continuance of the old doctrines of real property in the jurisprudence of to-day is that, while the judges are thoroughly familiar with and move at ease among the general doctrines of contract and equity which govern the ordinary transactions of modern life, it is impossible (or if not impossible at least very unlikely) that they should have at their fingers' ends the fundamental distinctions of a highly artificial system, and they are in danger of being unduly governed by "the *cantilena* of lawyers" and of losing opportunities for the simplification of the law.¹

¹ Mr. Charles Sweet, the learned editor of the third edition of Mr. Challis's book, says that he "thinks that the weight of authority and

§ 783. There is a series of cases which in this connection demands attention. In *Doe d. Blomfield v. Eyre*¹ on the marriage of M. copyholds were settled on her husband for life, and on his death to her children as she should appoint. M., having two sons, appointed the copyholds to her son J. and his heirs, but if both her sons died before her husband, then to her father-in-law. Both sons died before the husband. The Court of Common Pleas held that a gift over in default of appointment took effect; they said it was immaterial whether the gift to J. was so mixed with the void gift to the father-in-law that it failed altogether, or whether J. took an interest which had been defeated, by the sons dying in the father's lifetime. This latter view had not been taken by counsel. The case was then carried on error to the Exchequer Chamber, and the Court there, consisting of Parke, B., Alderson, B., Coleridge, J., Platt, B., Erle, J., Rolfe, B., and Wightman, J., affirmed the judgment, on the ground that J.'s estate had been divested. In the course of argument the following dialogue took place: Parke, B., "What estate do you contend that J. took?" Bovill, for the defendant in error: "It is difficult to define it with accuracy, seeing that copyholds are not within the statute of uses. Perhaps, the best definition would be, to call it a qualified conditional limitation in fee." Platt, B., "Or, a conditional copyhold of inheritance."² This case cannot be considered as an authority in favor of a possibility of reverter in freehold estates at the present day, for: (1) The appointment must be read into the original settlement, and the gift in default of appointment becomes an executory limitation. (2) The estates in question were copyhold, and copyholds are not subject to the Statute *Quia Emptores*, and therefore there is no reason why a determinable fee should not exist in copyhold land.³

§ 784. In *Robinson v. Wood*⁴ land was devised to trustees in trust to convey the same to A. when she attained twenty-one, but if she should die under twenty-one without leaving issue her surviving, then to sell the same and pay the proceeds to a charity. The gift to the charity was void under the Mortmain Act. *Kindersley, V. C.*, on the authority of *Doe d. Blomfield v. Eyre*, held that on the death

argument is against Mr. Challis."

Challis, *Real Prop.* (3d ed.) 439.

¹ 3 C. B. 557; 5 C. B. 713.

² 5 C. B. 735 *ad fin.*

³ See 1 Tiffany, *Real Prop.* § 148.

⁴ 27 L. J. Ch. 726.

of the daughter without leaving issue her surviving, her estate was determined. But here the interests were equitable and the question was not of a legal possibility of reverter but of a resulting trust.¹

§ 785. In *O'Mahoney v. Burdett*² a testatrix bequeathed £1,000 in the 3½ Irish stock to her sister for life, and after her death to her sister's daughter, but, if this niece should die unmarried or without children, the £1,000 to revert to the nephew of the testatrix; and she made Burdett her executor and residuary legatee. The sister and nephew both died in the lifetime of the testatrix. The Master of the Rolls in Ireland made an order declaring that the niece was absolutely entitled to the legacy. The Court of Appeal in Chancery reversed the order; and the House of Lords affirmed the decision of the Court of Appeal, and held that the legacy fell into the residue. This again was not a case of a possibility of reverter but of interests in personalty.

§ 786. It may be added that the cases cited in the last three sections are perhaps not to be accepted as certain law. *Doe d. Blomfield v. Eyre* has in its support the great authority of the many distinguished judges who decided it both in the Common Pleas and in the Exchequer Chamber, and also of the approval of Lord St. Leonards.³ But it must be observed that the point that the estate appointed to the son determined upon the happening of the given contingency, although the appointment over on that contingency was void, was not argued before the Court of Common Pleas, and was spoken of by that Court as immaterial; ⁴ that the decision was at once criticised by the learned reporter in a note; that although it has been followed by *Robinson v. Wood*,⁵ and *Hurst v. Hurst*,⁶ yet no judge has said anything in its favor; and Kindersley, V. C., in the former case and Fry, J., in the latter, intimated plainly that they thought the decision wrong. If I may venture to express an opinion, *Doe d. Blomfield v. Eyre* has always seemed one of the most inexplicable cases in the books. It was decided by some of the most eminent judges of modern times, but how they could have decided it as they did, against the marked policy of the law for not readily divesting vested estates, has been

¹ See §§ 327, 327 *a*, *ante*.

² 10 Ir. Ch. 14; L. R. 7 H. L.

388.

³ Sugd. Pow. (8th ed.) 513.

⁴ 3 C. B. 580.

⁵ 27 L. J. Ch. 726.

⁶ 21 Ch. D. 278.

as great a puzzle to me as it has been to Vice-Chancellor Kindersley and to Mr. Justice Fry.¹

§ 787. In *O'Mahoney v. Burdett* no question of the effect of the lapse of the executory devise to the nephew of the testatrix was discussed in the Irish Chancery. The whole argument and the whole decision was directed to the question whether the gift over upon the death of the niece of the testatrix unmarried or without issue was confined to her death during the lifetime of the one having the life interest; and what is said in the House of Lords on the effect of the lapse is short and most unsatisfactory. Lord Cairns, C., said: "This point was not raised in the court below, and I am satisfied that the gift to Colonel L'Estrange having failed by lapse the residuary legatee is entitled to take all that Colonel L'Estrange, if living at the death of the testatrix, could have taken."² Lord Selborne said: "When the appeal was first opened, I doubted whether, under these circumstances, the effect of the divesting clause was not wholly evacuated, in the same way as if there had been a blank in the will for the name of the substituted legatee. But the result of the preliminary argument on that point, and of the authority cited by the Respondent,³ has been to satisfy me that the lapse of a contingent gift, by way of substitution, to a person named who might have survived the testatrix, operates (when the contingency has happened on which the gift to the person was made to depend) for the benefit of the residuary legatee, or next of kin, in the same way as if the gift had been originally made to the same person, free from any contingency."⁴

§ 788. If *O'Mahoney v. Burdett* can be supported it must be, it is submitted, on the ground suggested for such a decision in the note to *Doe d. Blomfield v. Eyre*.⁵ "Where there is a devise by A. to B., in fee, defeasible, on an event which happens, in favor of C. in fee, and C. dies in the lifetime of A., the only mode, it is conceived, by which the heir of A. could be let in would be to treat the devise to B.

¹ See 2 Jarm. Wills (6th ed.) 1436. If a good appointment in fee is followed by an appointment over in the nature of an executory devise which is bad for remoteness the doctrine of these cases, even if good, would not, it is presumed, apply. See §§ 247, 534, *ante*.

² L. R. 7 H. L. 399.

³ *Quære*: What was this authority? It does not appear from the report.

⁴ L. R. 7 H. L. 407, 408.

⁵ 5 C. B. 748.

as revoked by the devise to C. becoming absolute, and to consider the heir of A. as *in* by the lapse of the devise to C., instead of treating the devise to B. as ceasing to be defeasible on the failure of the devise to C." But it may be questioned whether this is a correct view of the lapse. Does not the heir take because there is now no devisee, and not because he stands in the place of the devisee? The only other case where I have found the question raised was in New Jersey, and there the decision was the other way.^{1, 2}

F.

FUTURE INTERESTS IN PERSONAL PROPERTY.³

§ 789. Lord Coke, in *Lampet's Case*,⁴ says, "This case of a devise of a lease for years to one for life, and after his death to another during

¹ *Drummond v. Drummond*, 11 C. E. Green, 234.

² My learned friend, Professor F. W. Maitland, has called my attention to a curious entry in the records of the Inner Temple. In 1506 "Knyghtley and Baker are assigned a chamber newly made under the library, and because they have laid out many necessary expenses upon the same, the chamber is assigned to them and their heirs, being members of the society." 1 Calendar of Inner Temple Records, 6. Whether this assignment was in the nature of a license or whether it was an attempt to grant a determinable or rather intermittent fee, *quære*. Cf. *Challis*, Real Prop. (3d ed.) 113.

³ The substance of this Appendix was printed as an article in 14 Harv. Law Rev. 397. To that

article was prefixed the following dialogue, which is retained here because, though rather light in form, it may aid to bring out more clearly the questions discussed in this Appendix.

Some time ago, a student at the Harvard Law School came to me with the question which was puzzling him. We had a long talk, in which many diversities were taken and points resolved, but the substance of the discussion can be put into the form of a short Socratic dialogue in which I do not play the part of Socrates.

S. If a silver cup is bequeathed to a man for his life, and on his death to a college, you say, do you not, that the man has the absolute property, and that the college has not an interest in the nature of a

⁴ 10 Co. 46 b, 47 a.

the residue of the term, hath produced *septem quæstiones vexatas et spinosas*." The case of a like bequest of a chattel personal has added

vested remainder, but has an executory interest.

G. That is what I say.

S. Suppose the testator bequeaths the cup to his son for life, and on his death to the son's eldest son for life, and then to the college, and that the testator's son is never married, is the gift to the college too remote?

G. No, it is not too remote.

S. But if it is executory, as you say, surely it is too remote.

G. It is, indeed, on the one hand, executory, but on the other hand it is to be considered, on a question of remoteness, as if it were a devise of land, and, if it were land, the gift to the college would be vested and therefore not too remote. You will find the authorities in § 117 of my book on the Rule against Perpetuities [1st ed.].

S. Let me put another case: Suppose I give a cup to a man to hold during his life, and I say nothing as to what is to happen on his death, where does the cup go on his death?

G. Surely it comes back to you, or if you are dead, then to your executor.

S. How can that be? The man, you say, has the absolute property; there is no gift away from him. Why does not the cup go to his executor?

G. In Delaware, indeed it does; but in the rest of the common-law world it comes back to you, as I have said.

S. For most purposes it is all the same whether a future interest in

personalty is vested or executory, is it not?

G. That is true.

S. I have suggested two classes of cases in which it is important whether you consider a future interest in a chattel to be vested or executory. Do you know of any other?

G. I do not at present think of any other classes of cases.

S. Nor do I think of any other. This is, then, what you do; you say that future interests in chattels are executory, and yet in the only cases in which it is of any consequence whether they are vested or executory, you treat them as vested.

G. It would seem that that is what I do.

S. But, by the shade of that great man, Mr. Pooley, that is strange.

G. It is indeed strange.

S. Why do you act thus?

G. It is desirable that future interests in personalty should be considered vested for several reasons. *First* —

S. Pardon me, but I do not deny that future interests in personalty should be treated as vested, — that, indeed, is excellent, — but why, if you always treat them as if they were vested, do you persist in calling them executory?

G. Because Lord Coke, and Mr. Preston, and Mr. Joshua Williams say I must. We should revere the gods.

I do not know whether this conclusion was satisfactory to my in-

to the difficulty of these questions; they have never been satisfactorily solved, nor does such solution seem possible until a clear conception is formed of the nature of future interests in personalty. This conception has hitherto been absent in the law.

§ 790. Property is a right *in rem* (or against all the world) which gives to the owner of the right an indefinite (though not necessarily an unrestricted) power of user over a thing, as opposed to a right *in aliena re*, such as an easement or *servitus*, which gives the person having the right a certain definite power of user over a thing in which another has the property.

§ 791. Property ¹ may be of either limited or unlimited duration. At least, this is the doctrine of the common law with regard to land. Property in land is called an estate. It may either be a right which on the owner's death passes to successors, determined by certain rules, indefinitely — that is, without defined limit — as an estate in fee-simple or in fee-tail; or it may be a right for a period which must come to an end, although the time at which it will determine is uncertain — as an estate for life; or again it may be a right for a period which has a termination certain — as an estate for years.

§ 792. Estates are either present or future.

§ 793. Future estates are either vested or executory.

§ 794. I. A vested future estate is one which is prevented from coming into possession only by the existence of some previous estate or estates; it is an estate which is ready to come into possession in whatever way and at whatever time the preceding estate or estates determine. For instance, if land is devised to A. for life, and subject to A.'s life estate, to B. and his heirs, B. has a vested estate. These estates are reversions or vested remainders.

§ 795. II. An executory estate is one which will not become a present estate until something, other than the termination of a previous estate or estates, occurs.

§ 796. This something may be an event certain or uncertain.

§ 797. A. If it is a certain event.

(1) It may be one which will happen at a time certain.

Thus, a devise of land to A., to hold from the first day of Janu-

terlocutor; it certainly was not to me. But the conversation set me a thinking on the true nature of future interests in personalty.

¹ Much that is said here of property is true, *mutatis mutandis*, of rights *in aliena re*.

ary after the testator's death, creates an executory estate of this first sort.

Or (2) it may be an event which will certainly happen, but of which the time of happening is uncertain.

Thus, a devise of land to B. from and after the death of A. (A. not taking a life interest) creates an executory estate of this second kind.

§ 798. B. If it is an uncertain event.

Then the estate is a contingent one.

(1) It may be one which must come into possession, if at all, on the termination of a preceding estate or estates as originally limited. Estates of this first kind are contingent remainders.

Thus, upon a devise of land to A. for life, and if A. die unmarried then to B. and his heirs, B. has a contingent remainder.

Or (2) it may be an estate which may come into possession at a time other than the termination of the preceding estate or estates as originally limited.

Thus, upon a devise of land to A. and his heirs, but, if A. die unmarried to B. and his heirs, B. has an executory interest of this second kind.

§ 799. Estates of all the above kinds can be created in land at the present day, but originally this was not so. Owing to familiar doctrines of the feudal law, into which it is unnecessary here to go, the only future estates originally allowed by the Law were estates which fitted on to previous estates, without cutting them short, or leaving a gap. These estates were called reversions or remainders, and they came into possession either whenever and however the previous estates determined, in which case they were reversions or vested remainders (*I. ante*), or else they came into possession immediately upon the determination of the previous estates as originally limited, if some event (other than the determination of the preceding estates) had or had not happened. In this case they were contingent remainders. Of these latter, II. B (1) is the type.

§ 800. The other kinds of executory estates were brought in by the Statute of Uses and the Statutes of Wills, and are represented by II. A (1) and (2); and II. B (2); they have various names — springing uses, shifting uses, executory devises, conditional limitations.

§ 801. It will be noticed that Contingent Remainders are here classed among Executory estates, as opposed to Vested Estates;

this is a convenient classification, and there does not seem any good term other than Executory Estates to express the opposite of Vested Estates. But, to prevent confusion, it must be borne in mind that Contingent Remainders are often excluded from the definition of Executory Estates, and a distinction made between Remainders, Vested and Contingent, on the one hand, and Executory Estates on the other, a Remainder being an interest which will come into possession, if it comes at all, on the termination of some estate as originally limited. That is, Vested Estates are opposed to Executory Estates in the larger sense, which consist of Contingent Remainders and of Executory Estates in the narrower sense.

§ 802. There are no feudal doctrines and no statutes limiting the creation of future interests in personal property, and there is no reason in the nature of things why the law should not allow the same future interests in personalty as are allowed in realty; we shall see, however, that this has not always been supposed to be the case.

§ 803. Personal property is of two kinds, chattels real and chattels personal. When future interests in personal property have been in discussion, mistakes have, I think, occurred from the two kinds of chattels being confused.

§ 804. Estates in land which have a termination certain, that is, estates for years, are not deemed in the common law realty, but personalty; if the owner dies before the years have run out, the estate goes not to his heirs, but to his executors.¹ Such an estate is a chattel real, and there may be estates or interests in it. Let us take the interests in realty and see how far they can be applied to chattels real. These interests are of three kinds: (I.) Rights passing on death to successors; (II.) Rights which determined at a fixed time, estates for years; (III.) Rights which must determine, but whose time of termination is uncertain, estates for life.

§ 805. I. Rights passing on death to successors. In the earliest times, estates for years might be made transmissible to heirs,² but for centuries the only successors on death that the common law has allowed in chattels real have been executors or administrators, and therefore a lease for years to A. and his heirs, or to A. and the heirs of his body, is regarded as an inexact but successful attempt to give an estate for years to A. and his executors and administrators.³

¹ See 2 P. & M. Hist. Eng. Law (2d ed.) 110-117.

² See Id. 115.

³ Lit. § 740; Co. Lit. 388 a.

§ 806. II. Passing to estates for years in chattels real, we find that such estates in the form of sub-leases have been allowed from an early date¹ down to the present day without question; and that upon such a sub-lease the reversion remains in the owner of the chattel real and is a vested interest.

§ 807. III. Coming now to estates for life, we find it laid down that there can be no such things in a chattel real; that if a term for years is granted to A. for life, A. takes the absolute interest; and that upon A.'s death the term goes to A.'s executors or administrators, and does not revert to the grantor. Why is this? It is not because you cannot have a particular estate in a chattel real, for we have seen that you can have in a chattel real an estate for years and a vested reversion.

§ 808. The reason why there could be no estate or interest for life in a chattel real was the technical one that in the eye of the law a life estate was greater than an estate for years; and therefore as a term for years, even for a thousand years, would merge in a life estate, so a grant of a term for years to one for his life purported to carry something which was greater than a term for years, and carried merely a term for years only, because that was all there was to carry, and did carry the whole term. Thus in *Welcden v. Elkington*:² "If one who has a term for years grants it to another during his life, it is as much as he had granted it during all the years, for the limitation for life is as great as a limitation for all the years, and comprehends in judgment of law all the years; for inasmuch as a time for life is greater than a time for years, therefore the lesser is included in the greater." So in *Woodcock v. Woodcock*, per Walmsley, J.:³ "The law will not presume that there should be a continuance of the term after the death of the daughter."

§ 809. So, although a term for years may be assigned to have and to hold from and after a future time,⁴ yet such a grant to take

¹ 2 P. & M. Hist. Eng. Law (2d. ed.) 112.

Lord Mansfield's statement in *Wright d. Plowden v. Cartwright*, 1 Burr. 282, 284, that according to the old cases "the gift of a term (like any other chattel) for an hour, was good forever," appears to be grounded

on the mistaken analogy of a chattel personal. On the gift of a chattel personal for an hour, *vide* § 824, *post*.

² Plowd. 519, 520.

³ Cro. El. 795. See *Chalfont v. Okes*, 1 Ch. Cas. 239; *Jermyn v. Orchard*, Show. P. C. 199.

⁴ Per Anderson, J., *arguendo*,

effect after the death of the termor was said to be bad. "And here-upon Popham said it had been held, that if one has a lease for years of land, and grants to another all his term which should be to come at the time of his death, this grant is void, for in that he will hold the term during his own life, thereby he holds it for a time, which is as long as he has an interest in the land, so that there is no certainty that the term will ever commence, and therefore the grant so made is void. And the Lord Dyer in his argument afterwards affirmed that such grant could not be good to commence after the death of him who had the term; but he said that in a case which lately came before the Justices of the King's Bench upon a *postea*, where lessee for years granted by deed all his term to another, *habendum* to the grantee from the time of the death of the grantor, it was adjudged that the *habendum* was void, and that the term passed presently, because the premises of the deed and the *habendum* could not stand together; for by the premises of the deed the term was granted presently, and then the *habendum*, which would make the term commence after death, was inconsistent with the premises, and could not make any interest to pass, because the time when it should pass was thereby made incertain; for by the *habendum* the grantor intended to reserve to himself the estate or interest as long as he should live, and that the years which were to come after his death should pass, which could not be, because, when he reserved it for his life, therein he reserved it for all the term which he had, for a time for life is greater than a time for years; and therefore, inasmuch as the *habendum* and the premises could not stand together, the court adjudged that the term passed by the premises of the deed, rather than the *habendum* should destroy the whole. But in the other case, where lessee for years, without any *habendum*, grants to another all his term which shall be to come at the time of his death, the whole shall be totally void, because it is but one entire sentence." ¹

§ 810. But in *Rayman v. Gold* ² it was said that a man could either demise or devise a term to have and to hold after the death of a stranger who took no interest in the estate.

§ 811. The difference between the two cases is this: In the first

in *Welcden v. Elkington*, Plowd. 519, 524.

¹ *Welcden v. Elkington*, Plowd. 519, 520. See *Anon.*, 1 And. 122.

² *Moore*, 635.

case there was reserved an estate for life in the termor; and as, by the presumption of law, an estate for life cannot be less than an estate for years, the whole interest was in the termor; but in the second case, although by presumption of law a life estate is greater than an estate for years, yet there is no presumption that a certain man might not die within a term, and therefore in the second case the demise or devise was good. Mr. Preston seems to have overlooked this distinction.¹

§ 812. So far as transfers *inter vivos* are concerned, the law of England has remained in this condition down to the present day.² The only thing to the contrary is the ambiguous remark in *Butt's Case*:³ "So if the lessee for years grants the carve of land to another for the term of his life, he hath the whole term if he live so long, as well as in the case of a devise."⁴

§ 813. But from an early period, upon the devise of a term to one for life, and upon his death to B., the devise to B. was held good. The first suggestion that this might be done was in 1535;⁵ but the point was first distinctly held in *Welcden v. Elkington*.⁶ This decision was, upon the whole, followed, but there were judgments and *dicta* the other way, notably in *Woodcock v. Woodcock*,⁷ until in *Manning's Case*,⁸ and *Lampet's Case*,⁹ the validity of such devises over was settled.¹⁰ What was the theory upon which the court went in allowing these future devises of estates for years?

§ 814. It was at first suggested that there might be a difference between those cases where the term itself was given for life, and those cases where the use and occupation of the term were given, but this distinction was emphatically negatived in *Manning's Case*.

§ 815. The theory adopted was this: To carry out the intention of the testator, the apparent order of the limitations was reversed.

¹ 2 Prest. Abs. 6, 144; and cf. Lewis, Perp. 93, 94.

² See, however, § 820, *infra*.

³ 7 Co. 23 a.

⁴ "When they [future limitations of terms] came to be allowed by will, or by declaration of trust, the *substantial reason* was the same for allowing them by *deed*." Per Lord Mansfield, C. J., in *Wright v. Cartwright*, 1 Burr. 282; and,

as in that case, the courts have been astute to construe deeds so as to avoid the application of the doctrine.

⁵ Anon., Dyer, 7 a.

⁶ Plowd. 519; Dyer, 358 b.

⁷ Cro. El. 795.

⁸ 8 Co. 94 b.

⁹ 10 Co. 46 b.

¹⁰ See *ante*, §§ 149-152. Cf. 2 Harg. Jurid. Arg. 41, 42.

If a term was devised to A. for life, and on A.'s death to B., this was considered as, first, a gift of the term to B. after the death of A. (which, as we have seen, is good), and then a gift of what remained to A.; that is, B. had an executory devise and A. the whole estate, subject to the executory devise. "And inasmuch as the intent of the testator is evident by these words, it is the office of the court, as Anderson and Manwood said (and as Mounson Justice, also afterwards said to me) so to marshal and construe the words that the intent may take place, and the end be effected, and not destroyed, if any sense at all can be made of them by law. Then here it appears to the court that the lease was made for sixty years from the feast of the Annunciation of our Lady *in anno* 35 H. 8, so that the lease would end in the year of our Lord 1604. And it was the will of the testator that his wife should have the land for so many of the years as she should live, and no longer, and that his son should have the residue. Then, in order to set the estates devised in a clear light, and to make them stand with the law, suppose that the estate limited to the son had been first expressed, and the wife's estate last, as if he had devised that the son should have the land from the death of his wife unto the end of the term or unto the Annunciation of our Lady in the year of our Lord 1604, and suppose further that he had devised the land to his wife during her life, would not this form of words have served the turn of both the wife and the son? And would not the law have warranted every part of this devise? Most certainly it would. And, Sir, so much is done in the present devise of the testator, for his devise is in substance to that purpose, and his words amount to as much. And it is the office of the court to adjudge what part of the sentence precedes and what follows, and they ought so to place them that the one part may not destroy the other, but that each may stand together. . . .

"Wherefore, inasmuch as the intent is the principal point to be considered in wills, and the words ought to be construed and applied so as to perform that intent, it is reasonable, and the office of the judges, to make such exposition of the words in the present case, as is agreeable to the intent of the testator, and consistent with the law of the realm, and that is, to construe the latter devise to the son to precede the former devise to the wife, which exposition is consonant to law and equity." ¹

¹ Welcden v. Elkington, Plowd. 522.

“So in the case at bar, when the wife dies it shall vest in Matthew Manning as by an executory devise, as if he had devised that after a son has paid such a sum to his executors, that he shall have his term; or that after the death of A. that B. shall have the term; or that after his son shall return from beyond the seas, or that A. dies, that he shall have it, in all these cases and other like, upon the condition or contingent performed, the devise is good, and in the mean time the testator may dispose of it; and therefore in judgment of law *ut res magis valeat*, the executory devise shall precede, and the disposition of the lease, till the contingent happen, shall be subsequent, as in the case at bar it was, and so all shall well stand together; for when he made the executory devise, he had a lawful power, and might well make it; and afterwards in the same will he had lawful power, and might well devise the lease till the contingent happened, and therefore it is as much as if the testator had devised, that if his wife died within the term, that then Matthew Manning should have the residue of the term; and farther devised it to his wife for her life.”¹

§ 816. As we shall see, in the United States future limitations of chattels personal can generally be created by deed as well as by will, and it seems probable that the same extension would be allowed with chattels real. But there is no decision precisely in point, although in Maryland it has been held in two cases that future limitations of leaseholds renewable forever are good;² and in the latter case the general question is discussed, and the conclusion reached that future limitations of ordinary terms for years can be created in this country as well by deed as by devise.

§ 817. Assuming, then, that if, in England by will, and in the United States by deed or will, a chattel real is given to A. for life, and on his death to B., B. takes a good legal estate, what is its character? Is it in the nature of a vested remainder of realty after a life estate, or is it in the nature of an executory devise after an absolute interest? We have seen that the latter is the theory of *Manning's Case*, and the older authorities. For most purposes this question is of no importance. B. has a good legal interest, and that is enough; but there are two classes of cases where the question becomes a serious one.

¹ *Manning's Case*, 8 Co. 95 a.
See *Fearne*, C. R. 402, 403; *Lewis*,
Perp. 87.

² *Arthur v. Cole*, 56 Md. 100.
Culbreth v. Smith, 69 Md. 450.

§ 818. *First.* Suppose a term is devised to A., who is now a bachelor, for life, on his death to A.'s eldest son for life, and on the death of such eldest son to A.'s other children absolutely. Here, had the subject of the devise been a fee instead of a chattel real, the gift to A.'s eldest son for life and the gifts in remainder to A.'s other children would all have vested in the lifetime of A., and so none of them would have been bad for remoteness. If, therefore, upon this devise of a term the estates for life are really life estates, then the final limitation to A.'s younger children is vested and good. But if what purport to be life estates in the term are really absolute interests, then the final limitation is an executory devise, which does not vest until it comes into possession, and is therefore too remote.

§ 819. *Second.* Suppose a term is devised to A. for life, and there is no devise over. If A.'s estate is really a life estate, then there is a reversion in the executor of the testator, and upon A.'s death the term passes to such executor; but if A.'s estate is really absolute, then, as there is no gift over, the term, upon A.'s death, will pass to A.'s executor.

§ 820. The theory of the old cases, based on the doctrine that there can be no life estate in a term, would require us to hold, in the first case, that the devise to A.'s younger children was too remote, and, in the second case, that the term would pass to A.'s executor and not to the executor of the testator. I am not aware that the first of these questions has actually arisen either in this country or in England. The second question has arisen in one case, *Eyres v. Faulkland*,¹ and in this, contrary to what doctrine seems to demand, there was held to be a reversion to the executor of the testator.² Whether it is worth while to preserve this doctrine will be considered after dealing with the law as to future limitations of chattels personal.

§ 821. The early law of chattels personal, and particularly the

¹ 1 Salk. 231.

² "The disposition of a term to one for life, with a remainder over, will in general entitle the first devisee to no greater interest than an estate for his life, if the remainder should not take effect, and the residue of the term will go to the

personal representatives of the testator." Per Lord Ellenborough, C. J., *Doe d. Everett v. Cooke*, 7 East, 269, 274. And see Lord St. Leonards, C., in *Ker v. Dungannon*, 1 Dr. & W. 509, 528; and *Wainman v. Field, Kay*, 507, 515.

question when and how far property was recognized in them apart from possession, has been discussed by Professor Maitland and Professor Ames in their invaluable articles on the seisin and disseisin of chattels.¹ I shall not wander into this attractive field, but start with the fifteenth century. I suppose it will be generally conceded that at that time the ideas of possession and of property were so far distinguished that the owner of goods who had bailed them to A. would be considered as still having the property in them, although they were in A.'s possession.

§ 822. There was no tenure, and there were no estates, in chattels personal; absolute property was the only kind of property recognized. In Bro. Ab. Devise, 13, it is said, "gift or devise of a chattel for an hour is forever." Professor Ames has some interesting remarks on this point: —

"If a chattel, real or personal, was granted or bequeathed to one for life, the grantee or legatee became not only tenant for life, but absolute owner of it. In other words, there could be no reversion or remainder in a chattel. Possibly others may have been as much perplexed as the present writer in seeking for the reason of this rule. The explanation is, however, simple. The common-law procedure, established when such limitations of chattels were either unknown or extremely rare, gave the reversioner and remainder-man no remedy against the life tenant. There was no action for chattels corresponding to the formedon in reverter and remainder for land. Detinue would, of course, lie in general on a contract of bailment; but the contract of bailment, like a contract for the payment of money, must be conceivably performable by the obligor himself, and therefore before his death; he could not create a duty binding only his executor. Consequently, there being no right of action against him, the life tenant's power of enjoyment was unrestricted. His ownership was necessarily absolute."²

§ 823. There are three difficulties in accepting this explanation.

First. It does not meet the case just cited of the gift of a chattel for an hour; a contract of bailment for an hour is performable by the obligor.

Second. By the end of the fourteenth century, detinue could be maintained for a wrongful detention apart from contract.

¹ 1 Law Quart. Rev. 324; 3 Harv. Law Rev. 23, 313, 337. ² 3 Harv. Law Rev. 315.

Third. In 1459¹ a bailment for life was recognized as valid.

§ 824. The reason why a gift of a chattel personal for an hour carried the absolute property was, it is submitted, that, executory interests not yet having been conceived of, property carried with it the absolute indefeasible power of alienation or destruction, and one who had this power for a moment gained the complete control. We have a perfect instance of the survival of this doctrine in the modern law on consumable articles. If a cellar of wine is bequeathed to A. for life or for a year, he has the absolute interest, for there is no restraint on his power to drink or waste it.

§ 825. But although property in chattels personal was always absolute, the use and occupation of them might be given to another than the one who had the property. Such gifts were generally for years or at will; they probably could not be given to a man and those succeeding him on his death.²

§ 826. Could there be a bailment of goods giving the bailee the use and occupation of them for life? There was certainly no principle of law against a bailment for life, and in the first case that has yet been discovered on the question, the validity of such a bailment is distinctly recognized. In the Year Book of 37 Henry VI. 30 (1459), a testator made A. and B. his executors, and bequeathed a graile or mass-book to B. to have and use for the term of his life, and after his death the remainder to A. in the same manner for the term of his life, and after his death the remainder to the parishioners of a church forever. The Court of Common Pleas held that the property was "not in the devisees, for they will have only the occupation and 'manurance' for term of their two lives and so no property in them." Bro. Ab. Devise, 13, under this case, says: "It is agreed in the time of Henry VIII. and Edward VI., to be good law that the occupation can so remain; but if the thing itself had been devised to the use [*al use*] the remainder is void, for a gift or devise of a chattel for an hour is forever, and the donee or devisee can give, sell, and dispose of it, and the remainder dependent on it is void, which note for it is '*valde bone diversitie.*'"³ That is: no legal property could be created

¹ 37 Hen. VI. 30; § 826, *post*.

² See, however, *Anon.*, *Owen*,

33.

³ See *Welcden v. Elkington*, *Dyer*, 358 b, 359 a; *Plowd.* 519, 521, 522; *Paramour v. Yardley*, *Plowd.* 539, 542.

in a chattel personal other than an absolute interest, but by the bailment of such a chattel to A. the use or occupation might be given to A. for life, and although A. thereby acquired no property, he yet gained a right of possession.

§ 827. The doctrine as then held is set forth in a decision of the Court of Common Pleas: "A prohibition was prayed unto the Council of the Marches of Wales, and the case was thus: A man being possessed of certain goods, devised them by his will unto his wife for her life, and after her decease to J. S., and died. J. S. in the life of the wife did commence suit in the Court of Equity, there to secure his interest in remainder, and thereupon this prohibition was prayed. And the Justices, viz. Banks, Chief Justice, Crawley, Foster (Reeve being absent), upon consideration of the point before them, did grant a prohibition, and the reason was because the devise in the remainder of goods was void, and therefore no remedy in equity, for *Æquitas sequitur legem*. And the Chief Justice took the difference as in 37 H. 6. 30, Br. Devise, 13, and Com. *Welkden & Elkington's Case*, betwixt the devise of the use and occupation of goods, and the devise of goods themselves. For where the goods themselves are devised, there can be no remainder over; otherwise, where the use or occupation only is devised. It is true that heirlooms shall descend, but that is by custom and continuance of them, and also it is true that the devise of the use and occupation of land is a devise of the land itself, but not so in case of goods, for one may have the occupation of the goods and another the interest, and so it is where a man pawns goods and the like. For which cause the Court all agreed that a prohibition should be awarded." ¹

§ 828. But by a series of decisions in the seventeenth century the severity of this distinction was relaxed, and it was held that if a chattel personal be bequeathed to A. for life and on A.'s death to B., the bequest to A. will be construed as a bequest of only the use and occupation to him; that he will have the possession; but that the property will be in B.² And it is now settled in England that if

¹ Anon., March, 106 (1641).

² *Vachel v. Vachel*, 1 Ch. Cas. 129 (1669). *Catchmay v. Nicholas*, Cas. temp. Finch, 116 (1673). *Smith v. Clever*, 2 Vern. 38, 59 (1688). *Shirley v. Ferrers*, 1 P.

Wms. 6, note (1690). *Clarges v. Albemarle*, 2 Vern. 245 (1691). Anon., Freem. Ch. 206 (1695). *Hyde v. Parrat*, 1 P. Wms. 1; 2 Vern. 331 (1695). *Tissen v. Tissen*, 1 P. Wms. 500 (1718). See Randall

a chattel personal is bequeathed to A. for life, and on his death to B., B. has a legal property interest.¹

§ 829. It seems to be the common notion in England that a legal interest in chattels personal after a gift of them to another for his life can be created only by will, and not by a deed or other instrument operating *inter vivos*, and consequently, when it is desirable to make such limitations, the legal title is vested in trustees.² A court may lend itself to construe a gift of a chattel for life as a gift of the use of the chattel for life, with greater ease in a will than in a deed, although this seems to be at the present day undesirable; but where the gift by deed is expressly of the use and occupation of a chattel to A. for his life and on his death the chattel to belong to B., there appears to be no reason why the gift should not take effect according to its terms. Undoubtedly, as has been said, the idea seems to prevail among the profession in England that the gift by deed to B. would be void, but there is, it is believed, no decision or authoritative *dictum* to that effect, and Blackstone's authority is flat to the contrary. He says,³ "If a man either by deed or will limits his books or furniture to A. for life, with remainder over to B., this remainder is good." And, as we shall see, Blackstone's opinion, which I submit is sound on principle, has been all but universally adopted in America.

§ 830. The theory that if a chattel personal is bequeathed to A. for life and on his death to B., A. has the use and occupation, and B. the immediate property, subject only to such use and occupation in A., seems to be the doctrine of the cases cited. This is clearly the doctrine in the case of the Graile and in both the cases from Plowden, as the passages cited above show. So in *Vachel v. Vachel*,⁴ where certain "rarities" were given to Rebecca Vachel for life and on her death to remain to the use of Thomas Vachel, Lord Keeper Bridgman held Rebecca "ought only to have the use of the said rarities during her life only, and [Thomas] is to have the same after her death." In *Hyde v. Parrat*⁵ Lord Keeper Somers, "on the strength and authority of the late precedents, which had followed the civil and

v. Russell, 3 Mer. 190, 195; *Hoare v. Parker*, 2 T. R. 376; § 84, *ante*.

¹ See § 84, *ante*.

² Wms. Pers. Prop. (17th ed.)

396.

³ 2 Bl. Com. 398.

⁴ 1 Ch. Cas. 129.

⁵ 1 P. Wms. 1, 6.

canon laws, in construing the *use* of the thing, and not the thing itself to pass, where the first devise is for a limited time, in order the better to comply with the intention of the testator, allowed the devise over to be good." So in *Tissen v. Tissen*.¹ "Anciently the notions were that a personal thing given to one for life, or even for a day, was a gift forever, and would not bear a limitation over; but the construction has since been that such devise passes only the use and profits and not the thing itself, and so it is made good that way." And in *Randall v. Russell*,² "a gift for life of a chattel is now construed to be a gift of the usufruct only."

§ 831. But although there seems to have been no judicial authority for holding that one to whom the use and occupation of a chattel personal has been bequeathed has the absolute property at Common Law, yet undoubtedly, of late years, English text-writers have said that upon the bequest of a chattel personal to A. for life and on his death to B., A. takes the absolute property, and B. has not a vested interest but an executory bequest.³ This has been the common view. I adopted it in the first edition of this book.⁴

§ 832. There can be no doubt, I think, that *this notion arose from overlooking the distinction between chattels real and personal. There is a legal presumption that a life estate is larger than any term for years, but there is no legal presumption that an interest for life in a picture will last longer than the picture itself.* And, further, there can be no bailment of land, while there can be bailment of a chattel.⁵

§ 833. I have succeeded in finding but one case in which this comparatively modern doctrine has received judicial recognition in England. *Re Tritton, ex parte Singleton*,⁶ was a case in bankruptcy before Wills, J. A testator gave to his wife "the right of possession and enjoyment of all my pictures during her life (if she shall so desire), and subject as aforesaid I give and bequeath all my said pictures to and for my son H. J. Tritton, for his own absolute use and benefit." The widow was still alive, the son assigned his interest under his father's will, and subsequently became bankrupt. The trustee in bankruptcy contended that the assignment was a bill of sale, and void

¹ 1 P. Wms. 500.

² 3 Mer. 190, 195.

³ Fearn, C. R. 402, Butler's note; Lewis, Perp. 97; Wms. Pers. Prop. (17th ed.) 394.

⁴ § 89, note.

⁵ See 18 Jurid. Rev. 133.

⁶ Reported 61 L. T. 301, and more fully in 6 Morell, 250.

as not having been registered. The judge held that the son's interest was a *chose in action* which was excepted from the Bills of Sale Acts. He said: "It is clear upon the authorities that there cannot be life estates and remainders of personal chattels. The interest which Mrs. Tritton took was definite, and it came first, and entitled her to the enjoyment and possession of these things — that was to the property in them during her lifetime. The son's interest was an executory bequest, which created no present or vested interest, and which, if the mother survived him, would never come into operation." None of the authorities which appear in either of the reports to have been cited by the counsel bear upon the matter, except the passage in 1 Jarm. Wills (4th ed.) 879.¹

§ 834. Having stated the old and the modern English theory with regard to chattels personal, let us now consider the nature of present and future interests in such chattels in the light of those theories. And, as we did with chattels real, let us take up those cases, *first*, where the first gift is to A. and his executors; *secondly*, where the first gift is to A. for years; *thirdly*, where the first gift is to A. for life.

§ 835. I. A chattel personal is bequeathed to A. and his executors. A. has undoubtedly here not only the possession but the property. As words of limitation are unnecessary to give an absolute interest in personalty, a gift to A. is equivalent to a gift to A. and his executors, unless the context shows that it is intended to give a less interest. If, then, after a bequest to A. and his executors there is a future gift over to B., such gift must be an executory bequest, and cannot be considered a vested interest until there is a right to immediate possession. The consideration of the two theories we have been discussing does not affect this class of cases. If there is no present bequest, but only a future bequest, then if no present gift is raised by implication, the property vests immediately in the next of kin or residuary legatees, and the future bequest is an executory bequest.

§ 836. II. A bequest to A. for years. Here is a bailment to A. A. has the possession, the use and occupation, but not the property. If there is a bequest to B. subject to this bailment, B. has the property and has a vested interest. If there is no such bequest

¹ See *In re Thynne*, [1911] 1 Ch. 282, where the property was in a trustee.

to B., then the property remains in the testator or his next of kin or residuary legatees, and he or they have a vested interest. In this class of cases, also, the adoption of the one or the other of the theories is immaterial. I do not think that any one at the present day would say (unless as to consumable chattels) that A. in a case of this kind had the property and B. an executory interest.

§ 837. III. A bequest of a chattel personal to A. for life, and on his death to B. It is in this class of cases that the adoption of the one or of the other theory becomes significant. According to the old theory, A. has the possession, the use and occupation only, and B. has the property and an immediate vested interest. According to the modern English doctrine, A. has the absolute legal property in the chattel, with an executory bequest over to B., which becomes a vested interest only upon the death of A.¹ Whether B.'s interest be an executory bequest, or whether it be a vested interest, which may properly be called a *quasi* vested remainder, it is a *legal* interest, and beyond the control of A., so that it is for most questions immaterial which theory is adopted, and this explains why the law has remained so long in an unsettled condition.

§ 838. But, as in the case of chattels real, there are two questions in which the character of future interests in chattels personal determines the decision: *First*. Suppose a chattel personal is bequeathed to A. for life, and on his death to A.'s eldest son for life, and on the death of such eldest son to A.'s other children and their respective executors as tenants in common. A. is at present a bachelor.

§ 839. Here, on the old theory, first A. and then his eldest son have the possession, use, and occupation, and the other children,

¹ Suppose the use and occupation of a chattel personal is bequeathed to A. for his life, and on his death, if he leaves children, the chattel to go to them, but if he leaves no children, to go to B. In this case, the interests of the children and of B. are both contingent, none of them have a vested interest. On the old theory, during the lifetime of A. has any one property in the chattel? In the case of such a limitation of realty, it has

been held by many learned writers that the fee is in the testator's heirs. If this be the correct view, as it probably is (see, *ante*, § 11), it rests upon the idea that the fee must be somewhere; but there seems no technical necessity that every chattel personal should always have an owner, and therefore it is best and most natural to say that during the life of A. no one has property in the chattel.

as fast as they are born, acquire vested interests in the property. The bequest to A.'s other children is good, for they must all be born and their interests vest in A.'s lifetime, and consequently the gift to them will not be too remote.

§ 840. But, on the modern English theory, A. and A.'s eldest son will each hold the property in succession, and the younger children will have an executory bequest not vesting until they have an immediate right to possession; this will not be till the death of A.'s eldest son, which may be more than twenty-one years after the death of A., whose was the only life in being at the testator's death. Consequently the bequest to A.'s younger children is void as violating the Rule against Perpetuities. Mr. Marsden, in his Treatise on the Rule against Perpetuities,¹ adopts this latter view.

§ 841. So far as authority goes, the English decisions are all in favor of the former view.² In each of them the ultimate interest in personalty after the death of an unborn person was considered vested and not too remote. In *Evans v. Walker* the interest was legal; in the other two it was equitable. But, in considering whether a limitation is vested or not, the same rules apply in equity as at law.

§ 842. *Second.* Suppose chattels personal are bequeathed to A. for life, and there is no gift over. Here, according to the old theory, there is a reversionary vested interest in the next of kin or residuary legatee of the testator, or rather in the executor of the testator, and a right to immediate possession arises on the death of A. According to the modern English theory, A. has the absolute property, and there being no executory bequest, there is nothing to take the property from him, and on his death the chattels go to the executor of A., and not to the executor of the testator. The only English case which touches this question is *Eyres v. Faulkland*,³ in which the point was decided, as to a term of years, in favor of the testator's executor.⁴

§ 843. Hitherto I have confined myself to the English law as to chattels personal; let us now take up the law in the United States.

§ 844. We have seen that although the English law recognizes the

¹ Pp. 43, 44.

Ch. D. 211; *Re Roberts*, 19 Ch. D. 520.

² *Routledge v. Dorril*, 2 Ves. Jr. 357, 366, 367; *Evans v. Walker*, 3

³ 1 Salk. 231. See § 820, *ante*.

⁴ See 24 Law Quart. Rev. 431.

validity of a future bequest by will of a chattel personal, the modern English conveyancers have said that a future limitation of a chattel personal cannot be created by deed. The decisions in North Carolina have adopted this latter view, and do not allow any future limitations of chattels personal to be created by a conveyance *inter vivos*.¹ In 1823 a statute was passed, changing the law as to slaves; but as to all other chattels the law remained, and remains, the same as before.² But in the other States, so far as the question has yet arisen, the same future limitations of chattels personal that can be created by will can be created also *inter vivos*.³ It may therefore be said to be the general American law that any future limitation of chattels personal which can be made by will can be made also by deed.

§ 845. It is submitted that the American law is a return to the sounder doctrine laid down by Blackstone.⁴ Future interests in personalty owe nothing to statutes; they are what they are by the Common Law, and any distinction between the right to create them by deed and the right to create them by will seems purely arbitrary. Undoubtedly certain interests can be created under wills by language which would not have the same effect if used in deeds; but the present is not a question of construction or of the use of words, but whether it is possible, by any words, to make a future limitation of a chattel personal, and there is no reason why this power, if granted to a man on his death, should be denied to him in his lifetime.

§ 846. A notion which has found expression in a few American cases, viz. that after a gift or bequest of the absolute property in a chattel personal, there can be no executory limitation over, is of course totally erroneous. It had its origin in *Paterson v. Ellis*,⁵ where a gift over of personalty was held to be upon an indefinite failure of issue, and therefore too remote. Several members of the Court, however, said that after a bequest of personalty, absolute in its terms, there could be no executory bequest. But such an idea has been entirely repudiated in New York, the Courts pointing out that it arose from confounding the case of an executory bequest upon death without issue, or some other contingency not dependent upon the mere will of the first taker, which executory bequest is unquestionably good,

¹ See the cases cited, § 92, *ante*.

² *Lance v. Lance*, 5 Jones, 413;

Dail v. Jones, 85 N. C. 221.

³ See the cases cited, § 91, *ante*;

and cf. § 97, *ante*.

⁴ 2 Bl. Com. 398; § 829, *ante*.

⁵ 11 Wend. 259.

with the case of an executory bequest over upon the failure of the first taker to dispose of his interest by deed, or by deed or will, which latter form of executory bequest had been held in New York to be bad.¹ The Supreme Courts of Arkansas and Iowa have followed the erroneous *dicta* in *Paterson v. Ellis*.²

§ 847. In the case of *Wilson v. Cockrill*³ it was decided that if an absolute gift of a chattel personal was made by deed, an executory limitation over was void. The Court declined to consider whether it would have been good if created by will. This case and the case of *Betty v. Moore*⁴ are believed to be the only American cases, outside of North Carolina, in which any distinction between the validity of an executory limitation made by deed and of one made by will is suggested.

§ 848. The cases in the United States in which executory limitations after absolute gifts or bequests of chattels personal have been allowed are very numerous.⁵

§ 849. To come now to the case where a chattel personal is given to A. for life and on his death to B. The gift over to B. is universally recognized as valid throughout the United States when it is created by will, and also (except in North Carolina) when it is created *inter vivos*. And not only is it a valid interest, but it is a valid legal

¹ *Norris v. Beyea*, 13 N. Y. 273. *Tyson v. Blake*, 22 N. Y. 528. See Gray, *Restraints on Alienation* (2d ed.), §§ 65 *et seq.*

² *Moody v. Walker*, 3 Ark. 147. *Maulding v. Scott*, 13 Ark. 88. *Scull v. Vaugine*, 15 Ark. 695. *Slaughter v. Slaughter*, 23 Ark. 356. *Robinson v. Bishop*, Id. 378. But cf. *Bunch v. Nicks*, 50 Ark. 367, 276. *Talbot v. Snodgrass*, 124 Iowa, 681.

³ 8 Mo. 1.

⁴ 1 Dana, 235. See §§ 91, 95, *ante*.

⁵ *Moffat v. Strong*, 10 Johns. 12, 18. *Deihl v. King*, 6 S. & R. 29. *Drury v. Grace*, 2 H. & J. 356. *Rarorg v. Hammond*, 2 H. & G. 42. *Dashiell v. Dashiell*, Id. 127. *Biscoe v. Biscoe*, 6 G. & J. 232. *Jones*

v. Sothoron, 10 G. & J. 187. *Clagett v. Worthington*, 3 Gill, 83, 92. *Edden v. Middleton*, 9 Gill, 161. *Woodland v. Wallis*, 6 Md. 151. *Budd v. Posey*, 22 Md. 48. *Waddy v. Sturman*, Jeff. 5. *Higgenbotham v. Rucker*, 2 Call, 313. *Royall v. Eppes*, 2 Munf. 479. *Timberlake v. Graves*, 6 Munf. 174. *Threadgill v. Ingram*, 1 Ired. 577. *Brasswell v. Morehead*, Busb. Eq. 26. *Keating v. Reynolds*, 1 Bay, 80. *Henry v. Means*, 2 Hill (S. C.) 328. *Hill v. Hill*, Dudl. Eq. 71, 83, 84. *Rogers v. Randall*, 2 Speers, 38. *Marshall v. Rives*, 8 Rich. 85. *Henderson v. Kinard*, 29 So. Car. 15. *Robert v. West*, 15 Ga. 122. *Harris v. Smith*, 16 Ga. 545. *Moore v. Howe*, 4 T. B. Monr. 199.

interest which has been repeatedly the subject of an action at law.¹

§ 850. But is this limitation to B. a vested interest in the nature of a remainder, subject to the right of A. to the possession of the chattel for life; or is A. to be regarded as having the absolute property, with an executory bequest over to B.? In other words, do the American courts apply the old doctrine which prevailed in England down to the middle of the eighteenth century, or have they adopted the theory of the more modern conveyancers? It is impossible to determine this from the names attributed in the reports to the interest of B., for there is no uniform practice; sometimes it is called a remainder, sometimes an executory limitation; to determine its nature, we must have recourse to the two test cases which we have applied in the case of the English Law.

§ 851. *First.* Suppose a chattel personal is bequeathed to A. for life, on A.'s death to his eldest son for life, and on the death of such eldest son then to the other children of A. A. is a bachelor at the testator's death. Is the bequest to the younger children of A. a good vested *quasi* remainder, or is it an executory bequest void for remoteness? We have seen that all the English authority is in favor of the former view, so are the only two American cases I have found on the point.²

§ 852. *Second.* Suppose a chattel personal is bequeathed to A. for life, and there is no gift over, does the chattel after A.'s death go to the executor of the testator or to the executor of A.? We have seen that there is but one English authority bearing on this question, but there is no lack of American authority. In Delaware, if a chattel is bequeathed to A. for life, A. takes the absolute property.³ In *Merker's Appeal* ⁴ a testator gave to his wife personal property "to her full ownership, so long as she doth live." The Supreme Court of Pennsyl-

¹ This recognition of the validity of such a gift when created by deed was recognized in Virginia in an early series of cases beginning in 1736; *Edmonds v. Hughes*, Jeff. 2; *Waddy v. Sturman*, Id. 5; *Jones v. Langhorn*, Id. 37; *Spicer v. Pope*, Id. 43.

Loring v. Blake, 98 Mass. 253.

Seaver v. Fitzgerald, 141 Mass. 401. And see *Crosby v. Crosby*, 64 N. H. 77; *Lennig's Estate*, 31 W. N. C. (Pa.) 234, 236.

³ *State v. Savin*, 4 Harring. 56, note. *Dericksen v. Garden*, 5 Del. Ch. 323.

⁴ 109 Pa. St. 235.

vania said: "It is a gift for life, without any limitation over, and without the intervention of a trustee. There is a line of decisions in this State which hold that such a bequest is absolute." The Court cites several cases as supporting this proposition, but the only one which tends to do so is *Brownfield's Estate*.¹ The proposition is, however, repeated in *Drennan's Appeal*² and *Hartman's Estate*.³ It seems rather to be a rule of construction than to be based upon any peculiar doctrine as to the nature of a life interest in personalty. It is justly criticised by Penrose, J., in *Kane's Estate*.⁴ In the other States the authority is all in favor of a reversionary interest.⁵

§ 853. *Summary.* — (I.) *Chattels real.*

A. There can be an estate for years (sub-lease) in a chattel real.

B. There can be no estate for life in a chattel real, because a life estate is larger than any term.

C. A gift for life of a chattel real passes the absolute interest.

D. Therefore, after a gift for life of a chattel real, there can be no vested interest or *quasi* remainder; any future interest after such gift can be good only as an executory limitation.

E. Such an executory limitation can be created by will.

F. In America (except in North Carolina) it can probably be created *inter vivos*. But there is no decision exactly in point.

G. In England it is said that it cannot be created *inter vivos*, but there is no decision to that effect.

H. The American doctrine is the better, as there is no rational distinction in this respect between deeds and wills, and no judicial authority in favor of such a distinction.

I. If a chattel real is bequeathed to A., a living person, and his

¹ 8 Watts, 465.

² 20 W. N. C. (Pa.) 522.

³ 11 Pa. Super. Ct. 35.

⁴ 6 Pa. Dist. C. 553; 19 Pa. C. C. 589. See *London v. Turner*, 11 Leigh, 403, 411, 413.

⁵ *Brown v. Kelsey*, 2 Cush. 243, 248, 249. *Hoes v. Hoesen*, 1 Comst. 120. *Morris v. Owen*, 2 Call, 520. *Bartlett v. Patton*, 33 W. Va. 71. *Anon.*, 2 Hayw. 161. *James v. Masters*, 3 Murphy, 110. *Black v. Ray*, 1 Dev. & B. 334. *Creswell*

v. Emberson, 6 Ired. Eq. 151; (see *Newell v. Taylor*, 3 Jones, Eq. 374). *Geiger v. Brown*, 4 McCord, 418, 427; s. c. 2 Strob. Eq. 359, note. *Haralson v. Redd*, 15 Ga. 148. *Booth v. Terrell*, 16 Ga. 20; s. c. 18 Ga. 570. *Johnson v. Johnson*, 104 Ky. 714. *McCutchin v. Price*, 3 Hayw. 211. *Vannerson v. Culbertson*, 10 Sm. & M. 150. *Harris v. McLaran*, 30 Miss. 533. *Keyes on Chattels*, §§ 276, 277.

executors, after a bequest for life to an unborn person, such gift to A., being an executory limitation, should on theory be held void for remoteness; but there is no authority on this point.

J. If a chattel real is bequeathed to A. for life, with no limitation over, A. takes the whole term, and there being no limitation over, it should on theory go, on A.'s death, to his executor; but the only authority is *contra*.

§ 854. (II.) *Chattels personal*.

A. A chattel personal can be bailed for years.

B. If a chattel personal is given to A. for life, and on his death to B., B. takes a legal interest.

C. This can be done by will.

D. And also, in the United States (except in North Carolina), *inter vivos*.

E. In England the modern text-writers say this cannot be done *inter vivos*, but there is no judicial authority to that effect.

F. The American doctrine is the better, for there is no rational distinction in this respect between deeds and wills.

G. If a chattel personal is bequeathed to A. for life, and on his death to B., A. has the use and occupation, and B. a vested interest, a *quasi* remainder. This is the doctrine of the older cases.

H. Modern English text-writers say that A. has the property in the chattel, and the bequest to B. is an executory limitation.

I. The older doctrine is the sounder. There is no reason why the use and occupation of a chattel personal should not be given for life; the doctrine (I.) B. *supra*, as to chattels real, has no application to chattels personal; there is no legal presumption that a man will live longer than a picture or table will last.

J. Suppose a chattel personal is bequeathed to an unborn person for life, and on his death to A. and his executors. If the gift to A. is vested (according to the old theory), then it is not too remote; if the gift to A. is executory, then it is void for remoteness. All the authorities, American and English, hold that the gift to A. is not too remote.

K. Suppose a chattel personal is given to A. for life, with no limitation over. Then, on the old theory, upon A.'s death there is a reversion to the donor or his executors. On the modern English theory A. takes the whole property in the chattel, and there being no limitation over, it should go on A.'s death to his executors.

There is no English authority directly on the point. The weight of American authority is in favor of the reversion.

§ 855. (1) As, therefore, there is no reason why the use and occupation of a chattel personal should not be given for life;¹ (2) as the judicial authorities proceed on the theory that the gift for life of a chattel personal is a gift of the use and possession only; (3) as there is no judicial decision the other way,² but only the *cantilena* of modern text-writers, based on the mistaken analogy of chattels real; (4) as on one of the test questions all the authority, English and American, and on the other the great weight of authority is in favor of the old view; and (5) as it is very desirable that in such matters there should be no difference between real and personal property, the statement may perhaps be ventured that in the United States we have stayed faithful to the old law, and that after a gift of a chattel personal for life there may be a vested interest in the nature of a remainder or reversion, and not merely an executory limitation.

§ 856. As to chattels real, it would certainly be desirable that in them, also, the Law should recognize the possibility of interests for life, and there is no reason in the nature of chattels real why it should not. On one of the two test questions there appears to be no authority either way, and on the other the sole decision is in favor of such recognition. The only obstacle is the notion that as an estate for life is longer than any term for years, a grant for life of a chattel real must pass all that there is to pass, i. e. the whole term. Would it be too bold a step on the part of the courts to drop this bit of antiquated scholasticism and put chattels real in the same position as chattels personal?

G.

GENERAL AND PARTICULAR INTENT IN CONNECTION WITH THE RULE AGAINST PERPETUITIES.³

§ 857. A State Court of reputation has decided an important question of common law contrary to every previous case. The ques-

¹ I have in general tried to avoid the expression "bailment for life," fearing it might shock some ears, although I myself have no objection to it.

² Unless *Re Tritton*, 61 L. T. 301, be an exception.

³ The substance of this article was printed in 9 Harv. Law Rev. 242.

tion has come up repeatedly in the English courts as well as in the courts of many of the United States, and has always been answered the other way. Yet the decision referred to is no careless or ignorant expression of opinion. It is a well-considered judgment, written with full appreciation of the unbroken authority against it. The case is *Edgerly v. Barker*,¹ decided by the Supreme Court of New Hampshire in an opinion written by Chief Justice Doe. Such a decision is an unusual occurrence and deserves examination.

§ 858. The case was this. Hiram Barker, a resident of New Hampshire, died, leaving a will and codicils which were duly proved. After sundry legacies, he gave the residue of his estate, real and personal, which was about \$600,000, to trustees in trust to pay his daughter Clara \$2,000 a year, and more if necessary for her comfortable support; to pay \$1,000 a year, or more in the discretion of the trustees, to his son, Hiram H. Barker, for the support of himself and his family, if from his habits and mode of life he should prove himself safe and competent to have the use and expenditure of the money; if not, then the trustees to have the expenditure of the money for the same purpose; to furnish means for the education of all the son's children, including those born after the testator's death; if the son should "become and remain temperate, sober, and correct in his habits" for five years together, \$5,000 to be paid to him, and at the end of ten years and of fifteen years further sums if he should remain "perfectly temperate and of good and regular habits;" and to pay to his son's wife, should she survive him, \$500 a year or more at the trustees' discretion.

§ 859. Then came the clause under which the question arose. It provided that the trustees should pay to each of said children of the testator's son, when said child should reach twenty-one, and to each child of his said daughter, if she should have any, the sum of from \$3,000 to \$5,000, if such child should be temperate and of good capacity to manage the money; and from time to time thereafter, as the wants and necessities of the children should require, the trustees should pay out such further sums as might be necessary; "and when the youngest of said children shall arrive at the age of forty years, then all my estate shall be theirs, to have and to hold the same to them and their heirs, those of them of good and regular habits and of capacity to do business and manage property, to take care of and man-

¹ 66 N. H. 434.

age, as trustees, the portion or portions thereof belonging to those, if any, who are not then possessed of such habits and capacity; but before said property shall vest in and be theirs, proper, suitable, and sufficient bonds or other security must be given by them for the payment of said sum or sums to my said daughter, if living, so long as she shall live, to my said son's widow if she shall then be living, so long as she lives and remains his widow, and also for the good and sufficient support of my said son so long as he shall live."

§ 860. The executors of the will brought a bill of interpleader against the testator's son and daughter, and against the trustees. The counsel for the trustees contended that the gift of the residue to the grandchildren was good; the son's counsel, that it was bad.

There were, of course, four questions:

First. To whom was the residue given?

Second. Was the gift vested or contingent?

Third. If contingent, was it too remote?

Fourth. If too remote, what was the consequence?

§ 861. The first two questions are questions of construction. The Chief Justice begins his opinion thus: "The construction of the will, including the question whether the testator intended the remainder, which he devised to his grandchildren, should vest in them before they became entitled to a distribution of it, is determined as a question of fact by competent evidence, and not by rules of law." This mode of expression is peculiar to the learned Court. Whether correct or not, it is unnecessary for the matter in hand to consider.

§ 862. *First.* The first question the Chief Justice answers by saying that the residue is given to living grandchildren and the issue *per stirpes* of deceased grandchildren. This is a highly novel construction, but it is purely a matter of interpretation, and I do not dwell upon it.

§ 863. *Second.* The Court assumes that the gift to the grandchildren is contingent. By including the issue of deceased grandchildren in the class of residuary legatees the Court does away with one of the chief arguments for calling the gift vested. Yet there is another circumstance that points strongly towards vesting, and that is the power given the trustees to make payments to the testator's grandchildren before the final distribution. This power might be, and probably would be, exercised to a very different extent with

different grandchildren, and yet, if the final gift be contingent, no account can be taken of this. I have, however, no desire to criticise the conclusion, or rather the assumption of the Court, that the gift is contingent. On the contrary, if I may take the liberty of saying so, it seems to me correct. The only gift to the grandchildren is the gift to pay when the youngest reaches forty; this makes the gift *prima facie* contingent; and the circumstances fortifying this conclusion seem to be greater than those against it. Yet it should be borne in mind that the testator (as is not unfrequently the case) had wishes which are really inconsistent, and that his wishes that the interests should vest fail of effect only because more and weightier indications of intention are inconsistent with their vesting. I want to insist upon this, because, as I think will be apparent to the learned reader, the circumstances making in favor of the vesting of this gift rendered it easier for the Court to introduce its new theory into the law than it would have been in the case of an unquestionably contingent gift.

§ 864. *Third.* The gift to the grandchildren then being contingent, is it too remote? Of this there can be no doubt. The gift is to them at forty, which is obviously beyond the period allowed by law.

§ 865. *Fourth.* What then is the result? The answer which has always hitherto been made in like cases is, that the gift is void, and there is an intestacy. The Supreme Court of New Hampshire now says that the fund is to be distributed to the grandchildren when they reach twenty-one. Until this case of *Edgerly v. Barker* the law, as held in every other jurisdiction where the common law prevails and the question has come up, is this. If a gift is made to a person or class as filling a particular character at a time which may be too remote, the court will not substitute therefor a gift to the person or class filling the character at a time within the limits. Thus, for a gift to such of the testator's grandchildren as reach twenty-five the court will not substitute a gift to such of the grandchildren as reach twenty-one or some less age. It would be pedantic to multiply authorities for this statement. Half a dozen from England, the United States, Canada, and Australia will suffice.¹ Indeed, the Supreme Court of New Hamp-

¹ Leake v. Robinson, 2 Mer. 363. Sears v. Putnam, 102 Mass. 5. Coggins's Appeal, 124 Pa. 10. Albert v. Albert, 68 Md. 352. Meyers v. Hamilton Co., 19 Ont. 358. Ker v. Hamilton, 6 Vict. L. R. Eq. 172.

shire does not suggest that there has ever been a decision or a judicial *dictum* of any kind denying or questioning the proposition above stated.

§ 866. The Chief Justice's line of reasoning, as I understand it, is this: —

(1) It is conceded that there must be some restraint on the creation of future interests.

(2) There is no statute in New Hampshire on the subject.

(3) There is no decision of the New Hampshire Court on the subject.

(4) The Court therefore must adopt or make a rule.

(5) The Rule against Perpetuities as administered in England is later than the settlement of New Hampshire, and therefore the decisions of the English courts are not binding precedents in that State.

All these propositions are unquestionably correct.

§ 867. The Court then goes on to lay down this rule. When there is a primary intention to make a gift to a class, and a secondary intention that the gift shall take effect at a period which may be too remote, the Court will give effect to the primary intention by substituting a gift to the class to take effect at a period which is within the limits. The Court then refers to certain cases which, although not precisely in point, it deems to be analogous and to furnish a support to its conclusion.

§ 868. Any comments on this novel doctrine of the New Hampshire Court fall naturally under four heads: —

I. The departure of the Court from the law held in other States.

II. The fallacy contained in the new doctrine.

III. An examination of the cases supposed to be analogous.

IV. The applications of the doctrine.

§ 869. I. It is true that there is no precedent, which the Court of New Hampshire has to regard as binding, that compels it to follow the rulings elsewhere; but I submit it is a serious thing deliberately to break away from the *consensus* of the English-speaking world on this subject. True, the matter is not one of commercial intercourse, and therefore it is not so important that the law should be uniform upon it; but persons often own land in States other than their own, and it is an evil that the laws governing the settlement and devolution of property should differ.

§ 870. Again, I am no blind admirer of the Rule against Perpetuities, but it is a doctrine of purely judicial origin, and it has grown to fit the ordinary dealings of the community. It is, too, a well-established, simple, and clear rule. There are indeed some few cases where the law is still unsettled, but they are largely on matters which will never come up in this country, such as the creation of long terms attendant upon estates tail. The process of adjudication has been a process of clearing and simplification, and the tendency of legislation, so far as it has touched the matter at all, has been to make the rule more stringent.

§ 871. It is a dangerous thing to make such a radical change in a part of the law which is concatenated with almost mathematical precision. A striking instance is shown by the fate of New York. Before the year 1828, the forty or fifty volumes of the New York Reports disclose but one case involving a question of remoteness. In that year the reviewers (clever men they were, too) undertook to remodel the Rule against Perpetuities, and what a mess they made of it! Between four and five hundred cases have come before the New York courts under the statute as to remoteness, — an impressive warning on the danger of meddling with the subject.

§ 872. II. The doctrine of the New Hampshire Court in this case involves a fallacy. It speaks of a primary intent to give to persons and a secondary intent to give to them at a particular time, and it purports to preserve the primary intent while discarding the secondary intent by substituting another time. This assumes that the persons remain the same, and only the time is changed. But that is precisely what does not occur; with the time, the persons are changed. Take the present case. The testator meant to give to those of his grandchildren who reached forty; the Court gives the property to those of the grandchildren who reach twenty-one. There may be six grandchildren who reach twenty-one, and only one who reaches forty. In such case shares would be given to five persons whom the testator never meant to have it. There may be some answer to this, but it is a real and a very serious objection, and deserves an answer, and it gets none from the New Hampshire Court. The case is dealt with throughout as if the only question were whether the same persons should get the property at forty or at twenty-one. As remarked above, the circumstances which tended to show an intention to make this gift vested probably obscured the fact from the Court that it

was taking property devised to one set of people and giving it to another.

§ 873. III. Let us look now at the cases which seemed to the New Hampshire Court to furnish a treatment of legal situations analogous to that which it adopted in *Edgerly v. Barker*.

§ 874. A. Under a power to lease for twenty-one years, a lease for forty years is good in equity for twenty-one years. This is true.¹ It is allowing a present vested interest to continue as long as a power permits. It has no similarity with changing the condition precedent on which a future interest is to vest so as to give it to those persons who happen to answer to a particular description at one time, instead of giving it to those persons who answer to the description at another time. We have here in fact an instance of that confusion of ideas which has been such a *fons malorum* in questions of remoteness. The Rule against Perpetuities is aimed against remote future contingent interests, and has nothing to do directly with the continuance of present interests. The failure to keep this clearly in view has led, and always will lead, to error.

§ 875. B. "Under a statute restricting to a term not exceeding twenty-one years the time for which a tenant for life can be empowered to lease, a testamentary gift to a tenant for life of a power to lease for sixty-three years is not void. If he makes a lease for more than twenty-one years it is void for the excess, and no more. Nelson, C. J., and Bronson and Cowen, JJ., in *Root v. Stuyvesant*, 18 Wend. 257, 273, 275-277, 290, 291, 302, 306, 307, 313."² Then follow two long extracts from Nelson, C. J., and Cowen, J. Would one suppose from this that Nelson, C. J., and Bronson and Cowen, JJ., were the dissenters from the judgment of the Court of Errors affirming the decision of the Chancellor? Yet such is the fact. The will in *Root v. Stuyvesant* was made before the statute, and at a time when terms for sixty-three years were good (though brought within the purview of the statute by a subsequent republication), and the Chancellor and the majority of the Court of Errors thought that the statutory inhibition of these terms so altered the scheme of the will as to avoid it altogether. The particular proposition for which the opinions of the dissenting judges in *Root v. Stuyvesant* are cited, that an appointment under a power is not rendered bad by the fact that a

¹ *Campbell v. Leach*, Amb. * 66 N. H. 462.
740, 745.

bad appointment could be made under the power, is good law enough. Indeed, almost every imaginable power is one under which a bad appointment might be made, e. g. a power to appoint to issue. What the opinions of the dissenting judges are cited for is not entirely clear. If it is that the court can mould invalid provisions so as to make them good, it is enough to say that the opinion of the Chancellor and the majority of the Court of Errors is directly opposed to such a view.

§ 876. C. The doctrine of *cy pres* forms a recognized exception to the rule that construction is not affected by questions of remoteness.¹ That doctrine is this. When land is devised to an unborn person for life, remainder to his children in tail, the unborn person takes an estate tail; so also when there is a series of successive life estates. This doctrine was originally confined to executory trusts, where, of course, it was all well enough, but it has been extended to legal estates.

§ 877. Now it should be observed that this doctrine has always been regarded with suspicion and disapproval by the ablest judges. Lord Kenyon was the first, in 1786, to extend it beyond the case of executory trusts, yet he himself, in *Brudenell v. Elwes*,² said: "The doctrine of *cy pres* goes to the utmost verge of the law. . . . We must take care that it does not run wild. . . . I know that great judges entertained considerable scruples at the time concerning that decision. [*Pitt v. Jackson*.³] It went indeed to the outside of the rules of construction." So Sir J. L. Knight Bruce, V. C., in *Boughton v. James*;⁴ "The doctrine has gone, at least, far enough." So the Court of Exchequer in *Monypenny v. Dering*:⁵ "Without, therefore, meaning to say that the doctrine [of *cy pres*] on which Lord Kenyon proceeded, and which V. C. Wigram felt himself bound to follow, is satisfactory to our minds, it is sufficient for us to say that those authorities are not precisely in point, and we do not feel inclined to carry the doctrine on which they rest one step further." And, finally, in *Brudenell v. Elwes*,⁶ Lord Eldon, C.: "Those cases have at least gone, as Lord Kenyon observes, to the utmost verge of the law; and I shall find it very difficult to alter an opinion I have taken up, that it is not proper to go one step farther; for in those cases, in

¹ See §§ 643 *et seq.*, *ante*.

² 1 East, 442, 451.

³ 2 Bro. C. C. 51.

⁴ 1 Coll. 26, 44.

⁵ 16 M. & W. 418, 434.

⁶ 7 Ves. 382, 390.

order to serve the general intent and the particular intent, they destroy both."

§ 878. But the indispensable condition for the application of the doctrine of *cy pres* is that the persons who take under it shall be *the same, no more and no fewer*, than those to whom the testator intended to give the estate. If the estate tail is suffered to continue undocked, then exactly the same persons will take under the doctrine of *cy pres* that the testator intended to take, and it is this equivalence which satisfied the formalism of Lord Kenyon, while later judges of more enlarged mind have recognized that the power of docking the entail really changes the persons who can take, and this has made them regret the decision.

§ 879. The doctrine of *cy pres*, circumscribed and criticised as it has been, is in truth a strong argument against a change by the authority of the court from one set of persons to another set of persons.

§ 880. D. It is strange that Chief Justice Doe did not bring forward a class of cases which furnish in truth a more plausible support to his views than any which he has given. If a testator devises his estate to his grandchildren in equal shares, and then directs that of the share of each granddaughter the income shall be paid to her for life and the principal conveyed to her children in fee, the gift to the children being bad for remoteness, the modification of the devise is rejected, and each granddaughter takes a fee. In such a case it may be said that there is a general intent and a particular intent, and that the latter is sacrificed to the former; but there is no change of devisees; to certain persons fees simple are given, and then those are cut down to life estates for a purpose; the purpose failing, the cut down is rejected by the court, and the fees simple revive, *but to the same persons*. Again, the testator has himself distinguished and separated the general intent from the particular intent. When he has not done this and the only gift is to granddaughters for life with remainders in fee, a granddaughter will only take a life estate; in order for a granddaughter to take the fee, there must be a distinct gift to her of the fee, and afterwards a separate modification.¹

§ 881. E. The history of the doctrine of general and particular intent in the law is well known. It was first introduced in *Robin-*

¹ *Whitehead v. Bennett*, 22 L. J. Ch. 1020. See §§ 423 *et seq.*, *ante*.

*son v. Robinson*¹ in the attempt to explain the Rule in *Shelley's Case* as a rule of construction; it produced the hopeless tangle of decisions of which Lord Eldon has said, "The mind is overpowered by their multitude, and the subtlety of the distinctions between them;"² and it was only when the doctrine of general and particular intent was repudiated, and it became firmly settled that the Rule in *Shelley's Case* was not a rule of construction, not a rule, however artificial, to discover intention, but a rule the object of which was to defeat intention, that any order was introduced into that chaos. Thus Lord Redesdale, in *Jesson v. Wright*:³ "That the general intent should overrule the particular, is not the most accurate expression of the principle of decision. The rule is that technical words shall have their legal effect, unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise." So Lord Denman, in *Doe v. Gallini*:⁴ "The doctrine that the general intent must overrule the particular intent has been much, and we conceive justly, objected to of late, as being, as a general proposition, incorrect and vague, and likely to lead in its application to erroneous results."⁵ The doctrine "is now exploded."⁶ In the fourth edition of Jarman on Wills⁷ is an elaborate discussion, proving the futility of the doctrine; but in the fifth edition⁸ the doctrine is dealt with as now obsolete, and only a short note inserted.

§ 882. This piece of legal history is full of instruction. The Rule in *Shelley's Case* is not a rule for interpretation, it is a rule the object of which is to defeat intention. Courts struggled to deal with it as a rule of construction, and instead of saying that the testator meant so and so, but the Rule forbade this intention being carried out, they strove to divide the testator's intention into two parts, one part which agreed with the Rule, and which they called the general intent, and another part which could not be made to square with Rule, and which they called the particular intent, and they professed to sacrifice the latter to the former, and said they were carrying out the general intent, when in truth both general and particular intent alike were defeated

¹ 1 Burr. 38.

⁵ See Hayes, Principles, pp. 44,

² *Jesson v. Wright*, 2 Bligh, 1, 110.

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³ 2 Bligh, 1, 56, 57.

⁶ Tud. L. C. on R. P. (4th ed.)

350.

⁴ 5 B. & Ad. 621, 640.

⁷ Vol. ii. p. 484.

⁸ Vol. ii. p. 1312, note.

by the Rule. The consequence was an unspeakable quagmire, of which no one can have a notion who has not ventured into it, and out of which escape was finally had only by the total repudiation of the theory of general and particular intent, and by a firm grasp on the principle that the object of the Rule is to defeat intention.

§ 883. The Rule against Perpetuities is, in like manner, a positive rule intended to defeat intention. To quote from the case of *Dun-gannon v. Smith*:¹ "The existence of the Rule as to Perpetuities is certainly no reason for altering the construction of the bequest." Per Maule, J. "Our first duty is to construe the will; and this we must do, exactly in the same way as if the Rule against Perpetuity had never been established, or were repealed when the will was made; not varying the construction in order to avoid the effect of that rule, but interpreting the words of the testator wholly without reference to it." Per Parke, B.²

§ 884. That is not what the Supreme Court of New Hampshire has done in *Edgerly v. Barker*; instead of saying that the testator meant a gift to those persons who were his grandchildren and their issue, when the youngest living grandchild reached forty, and then applying the rule, finding the gift was beyond the limits and cutting it off, the Court has striven to divide the testator's intention into two parts, part which is consistent with the Rule, which they call the general intent, and part which will not square with the Rule, which they call the particular intent, and then has proceeded to sacrifice the latter to the former, when in truth it has been substituting a new intent, and giving the property to a set of persons different from those to whom the testator gave it.³

¹ 12 Cl. & F. 546, 578, 599.

² See §§ 629 *et seq.*, *ante*.

³ The argument upon which the learned counsel for the trustees chiefly relied was that the English Commissioners on the Law of Real Property, in their Third Report, p. 70, had recommended the passage of a statute which should provide, among other matters, as follows:—

"19. Where a future estate or interest shall be limited to vest on

the event of a person not born, nor *en ventre sa mere*, at the creation of such future estate or interest attaining or not attaining an age greater than twenty-one, the settlor or testator shall be deemed to intend the age of twenty-one.

"20. Where an estate or interest shall be made determinable either by the original limitation thereof, or by virtue of any proviso, condition or agreement upon the event of a person not born, nor

§ 885. Legal history, like other history, repeats itself; here is the Supreme Court of New Hampshire taking the first step in that chase

en ventre sa mere, at the creation of such future estate or interest attaining or not attaining an age greater than twenty-one, the settlor or testator shall be deemed to intend the age of twenty-one."

But upon this argument it is to be remarked: —

1. That this statute was not recommended by the Commissioners as declaratory of the common law, but as an innovation.

2. That while so many of the recommendations of the Commissioners were adopted by Parliament, this never has been.

3. That other changes in the common law recommended by the Commissioners, and at least as beneficial, have never been adopted in New Hampshire. For instance, the rule in question is mercy and wisdom combined compared with the rule which requires a freehold to support a contingent remainder, and yet this last has been upheld in New Hampshire with uncalled-for severity.

4. That the Commissioners, feeling the great danger of tampering with the content of the doctrine of remoteness, or of attempting to distinguish between primary and secondary intent, made an arbitrary rule that when a testator says $21 + x$ years, he shall be conclusively presumed to mean twenty-one years; and that this is a pretty strong thing even for a statute.

5. That the case of a contingent gift to a shifting class, such as arose under the Barker will, was not within the purview of the contem-

plated provisions. Those provisions were intended to deal with individuals, not with changing classes; the estate dealt with is one limited to vest, not on a *class*, but on a *person* reaching or not reaching a certain age. The cases in the minds of the Commissioners were of a nature like this: "To A. for life, remainder to his eldest son in fee, but if he should die before he reaches twenty-five without leaving issue living at his death, to A.'s second son in fee, but if such second son should die before he reaches twenty-five without, &c., then to A.'s third son," &c. The Commissioners intended to provide that if a gift to A. was followed, on a contingency which might not occur until $21 + x$ years, by a gift to B., 21 should be substituted for $21 + x$, but they did not intend that C. should be substituted for B., which is precisely what the New Hampshire Court has done. It is very noticeable that in their Report the Commissioners say: "Sometimes a limitation is made to depend on the event of unborn persons attaining or not attaining some age greater than twenty-one;" but when they come to sum up their conclusions in the exact language of a proposed statute, seeing perhaps a possible danger of misconstruction, they change the plural into the singular, showing that they mean to deal with an individual and not with a changing class. In other words, the Commissioners obviously had in mind the advancing of the time for a

after the will o' the wisp of general and particular intent which the Court of King's Bench began more than a hundred years ago, and which, after long wanderings and stumblings and groanings of spirit, it has now finally abandoned.

§ 886. IV. *Applications of the New Hampshire Doctrine.*

A. Take first the present case. Here was a gift to grandchildren when they reached forty, the Court cut it down to grandchildren when they reached twenty-one, but why take that date? Why not give it to the grandchildren at once, without waiting till they reach twenty-one? The only answer would seem to be, "Although we cannot put off the period of distribution as late as the testator wished, we will put it off as long as we can." But that the Court has not done. Why not order the fund to be distributed among those grandchildren who are living at the end of twenty-one years from the death of both children? Or, better still, why not make the time of selection to be twenty-one years after the death of both the testator's children and of all his grandchildren living at his death? Or, again, why not make it twenty-one years after the death of all the students now at Dartmouth College? What can be said of the time selected by the Court, more than for any or all these?

§ 887. B. Or if there be special circumstances in this case pointing to twenty-one, how about a case where there are no such special circumstances?

§ 888. C. Again, (what the devise might easily have been in this case), — to such of the testator's grandchildren when the youngest reaches forty as are then of temperate habits. Would a gift to such of the grandchildren as were not drunkards at twenty-one satisfy the general intent of the testator?

§ 889. D. A gift to A., for life, after his death to any widow he may leave for life, and on the death of such widow to such of his children as are then living. Is this time to be cut down, and if so, to what period must survivorship be referred? The death of the husband? Twenty-one years after the death of the husband? The death of any wife born in the testator's lifetime? Twenty-one years after the death of any wife born in the testator's lifetime?

legacy to A. so as to enable A. to take; but there is no evidence, either in the Report or in the Propositions, that they ever contemplated applying the method so as

to take property given to one set of legatees and transfer it to another. To do that has been reserved to the Supreme Court of New Hampshire.

§ 890. E. To a church for a parsonage, but, whenever it is no longer used as a parsonage, then to A. and his heirs. Here is a general intent to have the property go over; under certain circumstances this can be done, under other circumstances it cannot; why not carry out that general intent under the former circumstances, if it cannot be under the latter? Why not allow it if the parsonage is given up within twenty-one years after the testator's death? Or within twenty-one years after the death of all the present members of the First Regiment of New Hampshire Militia?

§ 891. F. To the person who shall be Chief Justice of New Hampshire fifty years from to-day. Is Chief Justice Doe entitled to that gift? Is the Chief Justice who shall be in office twenty-one years from now entitled? Or shall the Chief Justice who attends the funeral of the last member of the New Hampshire bar now living take it?

§ 892. Here are cases, not recondite cases, but such as may occur to one *currente calamo*. They could be multiplied indefinitely. Outside of New Hampshire not merely would these cases present no difficulty to the courts, but any decently instructed lawyer could answer any of them promptly and with certainty. In New Hampshire, the more learned and acute the lawyer, the greater the perplexity in which such cases would plunge him.

§ 893. In fact, this novel doctrine substitutes for the set of devisees named by the testator another set selected out of an infinite number by the *arbitrium* of the Court.¹

H.

GIFTS TO INDEFINITE PERSONS FOR NON-CHARITABLE PURPOSES.²

§ 894. A devise or bequest for a charitable purpose is valid although there be no definite *cestui que trust*. The State, through the attorney-general and the courts, will compel the trustee, or, if need be, will appoint a trustee, to carry out the purpose. But this is an exception to the general rule. The general rule is that every trust

¹ See 1 Tiffany, Real Prop. § 157. Cf. *Hussey v. Sargent*, 116 Ky. 53; 38 Am. Law Rev. 683.

² This Appendix is extracted from an article in 15 Harv. Law Rev. 509.

without a definite *cestui que trust* is void. When there has been an attempt to create such a trust by will, and it is clear that the trustee was not intended to hold beneficially, there is a resulting trust for the heir, next of kin, residuary devisee, or residuary legatee of the testator, as the case may be. The court cannot carry out or protect the trust which the testator has tried to create, and so it gives the property to the person representing the testator, leaving it to him to carry out the purpose if he sees fit.¹

§ 895. In the leading case of *Morice v. Bishop of Durham* Sir William Grant puts the doctrine thus: "There can be no trust, over the exercise of which this court will not assume a control; for an uncontrollable power of disposition would be ownership and not trust. If there be a clear trust, but for uncertain objects, the property that is the subject of the trust is undisposed of; and the benefit of such trust must result to those to whom the law gives the ownership in default of disposition by the former owner. But this doctrine does not hold good with regard to trusts for charity. Every other trust must have a definite object. There must be somebody in whose favor the court can decree performance."²

§ 896. Under the head of gifts to trustees for non-charitable, indefinite objects come also cases where a gift, devise, or legacy is made to an unincorporated society or club. If the gift is in truth to the present members of the society, described by their society name, so that they have the beneficial use of the property, and can, if they please, alienate it, and put the proceeds in their own pockets, then there is a present gift to individuals which is good.³ But if the gift is

¹ *Morice v. Bishop of Durham*, 9 Ves. 399; 10 Ves. 521. *James v. Allen*, 3 Mer. 17. *Ommanney v. Butcher, T. & R.* 260. *Vezey v. Jamson*, 1 S. & St. 69. *Fowler v. Garlike*, 1 Russ. & M. 232. *Williams v. Kershaw*, 5 Cl. & F. 111, note. *Ellis v. Selby*, 1 Myl. & Cr. 286. *Stubbs v. Sargon*, 2 Keen, 255; 3 Myl. & Cr. 507. *Harris v. Du Pasquier*, 26 L. T. R. 689. *Buckle v. Bristow*, 10 Jur. N. S. 1095. *In re Jarman's Estate*, 8 Ch. D. 584. *In re Nottage*, [1895] 2 Ch. (C. A.)

649. *Chamberlain v. Stearns*, 111 Mass. 267. *Nichols v. Allen*, 130 Mass. 211. *Adye v. Smith*, 44 Conn. 60. *Holland v. Alcock*, 108 N. Y. 312. *Stewart v. Green, Jr.* R. 5 Eq. 470. *Browne v. King*, 17 L. R. Ir. 448. *In re Cullimore's Trusts*, 27 L. R. Ir. 18. See *McHugh v. McCole*, 97 Wis. 166; 1 Jarm. Wills (6th ed.) 900.

² 9 Ves. 399, 404, 405.

³ *Cocks v. Manners*, L. R. 12 Eq. 574. *In re Clarke*, [1901] 2 Ch. 110. *Old South Soc. v. Crocker*,

intended for the good not only of the present but of future members, so that the present members are in the position of trustees, and have no right to appropriate the property or its proceeds for their personal benefit, then the gift is invalid.¹ It is intended to be in trust for the society as such, which is a continuing entity in the contemplation of the donor, but which is not recognized by the law as having any standing in the courts.²

§ 897. Those cases where gifts to trustees for non-charitable purposes have been held void suggest a question which at first sight seems rather alarming. Very many clubs or other institutions not charitable have property held by trustees. Are these trusts void, and cannot the trustees expend the income for the benefit of the club? In answer to this question two suggestions can be made: *First*. The delivery of the property to the trustees is a good mandate, and the trustees can dispose of it in accordance with the mandate until the mandate is revoked.³ *Second*. There is in most cases a promise, express or implied, on the part of the trustee to apply the property delivered to him for the benefit of the club, he can be held on the contract, and the person delivering the property has a remedy

119 Mass. 1. *Henrion v. Bonham*, O'Leary on Religious and charitable Uses, 89; see *Stewart v. Green*, Ir. R. 5 Eq. 470. *In re Delany's Estate*, 9 L. R. Ir. 226. *In re Smith*, [1914] 1 Ch. 937. *In re Drummond*, [1914] 2 Ch. 90. See *Anon.*, 3 Atk. 277; *Brown v. Dale*, 9 Ch. D. 78; *Re New South Meeting House*, 13 Allen, 497; *Coe v. Washington Mills*, 149 Mass. 543; *Swift v. Easton Beneficial Soc.*, 73 Pa. 362; *Burke v. Roper*, 79 Ala. 138; *Stewart v. Green*, Ir. R. 5 Eq. 470; *Re Wilkinson's Trusts*, 19 L. R. Ir. 531; *Bradshaw v. Jackman*, 21 L. R. Ir. 12.

¹ *Thomson v. Shakespeare*, Johns. 612; 1 De G. F. & J. 399. *Carne v. Long*, 2 De G. F. & J. 75. *Re Dutton*, 4 Ex. D. 54. *In re Sheraton's Trusts*, [1884] W. N. 174. *In re Good*, [1905] 2 Ch. 60. *In re*

Clifford, 81 L. J. Ch. 220. *Troutman v. De Boissiere*, 66 Kan. 1. *Stewart v. Green*, Ir. R. 5 Eq. 470. *Hogan v. Byrne*, 13 Ir. C. L. 166. *Kehoe v. Wilson*, 7 L. R. Ir. 10. *Morrow v. McConville*, 11 L. R. Ir. 236. *Healy v. A. G.*, [1902] 1 I. R. 342. See *Carbery v. Cox*, 3 Ir. Ch. 231; *In re Clark's Trust*, 1 Ch. D. 497; *In re Amos*, [1891] 3 Ch. 159; *Re Swain*, 99 L. T. R. 604; *In re Drummond*, [1914] 2 Ch. 90; *Lennon's Estate*, 152 Cal. 327; *In re Ralston*, 5 Tasmanian L. R. 68; *Queensland Trustees v. Woodward*, [1912] Queensl. State Rep. 291; 1 Jarm. Wills (6th ed.) 278.

² *Hogan v. Byrne*, 13 Ir. C. L. R. 166. *Morrow v. McConville*, 11 L. R. Ir. 236, 243. See *Foulke*, Treatise, § 723.

³ See *Coe v. Washington Mills*, 149 Mass. 543.

for breach of contract.¹ When the money for the club is raised by subscription, there may be a contractual relation, not only between a subscriber and the trustee, but between the subscribers themselves, which would prevent the withdrawal of a subscription. But it seems that ordinarily a gift by will for a non-charitable club or society (not to be in the disposition for their own benefit of the immediate members) can be avoided by the heirs or next of kin of the testator. In such a case there is no contract.²

§ 898. In many cases in which the validity of a devise has in truth depended on whether it contravened the doctrine of *Morice v. Bishop of Durham*, the courts have said or suggested that it depended on whether a "perpetuity" was created.³ Particularly is this so in Ireland.⁴ And if we take "perpetuity" in its sense of "an

¹ *Gilman v. McArdle*, 99 N. Y. 451.

² On 'gifts to "College Fraternity Chapters" see 42 Am. Law Rev. 168, 180 *et seq.*

³ *Thomson v. Shakespear*, Johns. 612; s. c. 1 De G. F. & J. 399. *Carne v. Long*, 2 De G. F. & J. 75. *Rickard v. Robson*, 31 Beav. 244. *Fowler v. Fowler*, 33 Beav. 616. *Hoare v. Osborne*, L. R. 1 Eq. 585. *In re Clark's Trust*, 1 Ch. D. 497. *Cocks v. Manners*, L. R. 12 Eq. 574. *Re Dutton*, 4 Ex. D. 54. *In re Dean*, 41 Ch. D. 552. *Re Jones*, 79 L. T. R. 154. *In re Clarke*, [1901] 2 Ch. 110. *Re Swain*, 99 L. T. R. 604. *In re Clifford*, 81 L. J. Ch. 220. *In re Drummond*, [1914] 2 Ch. 90. *Piper v. Moulton*, 72 Me. 155. *Giles v. Boston Soc.*, 10 Allen, 355. *Bates v. Bates*, 134 Mass. 110. *Leonard v. Haworth*, 171 Mass. 496. *Morse v. Natick*, 176 Mass. 510. *Kelly v. Nichols*, 17 R. I. 306. *Sherman v. Baker*, 20 R. I. 446. *Coit v. Comstock*, 51 Conn. 352. *Angus v. Noble*, 73 Conn. 56. *Hartson v. Elden*, 50 N. J. Eq. 522. *Corle's*

Case, 61 N. J. Eq. 409. *Van Syckel v. Johnson*, 70 Atl. Rep. 657 (N. J., 1908). *Johnson v. Holifield*, 79 Ala. 423. *Troutman v. De Boissiere*, 66 Kan. 1. *Yeap Cheah Neo v. Ong Cheng Neo*, L. R. 6 P. C. 381, 394, 395. *Fraser v. Campion*, 29 N. Z. 1009. See *Estate of Gay*, 138 Cal. 552; *Tud. Char.* (3d ed.) 57.

⁴ *Stewart v. Green*, Ir. R. 5 Eq. 470. *Beresford v. Jervis*, 11 Ir. L. T. R. 128. *Kehoe v. Wilson*, 7 L. R. Ir. 10. *In re Delany's Estate*, 9 L. R. Ir. 226. *Morrow v. M'Conville*, 11 L. R. Ir. 236. *Dorrian v. Gilmore*, 15 L. R. Ir. 69. *In re Wilkinson's Trusts*, 19 L. R. Ir. 531. *Bradshaw v. Jackman*, 21 L. R. Ir. 12. *Reichenbach v. Quin*, Id. 138. *Armstrong v. Reeves*, 25 L. R. Ir. 325. *Small v. Torley*, Id. 388. *Brannigan v. Murphy*, [1896] 1 I. R. 418. *Webb v. Oldfield*, [1898] 1 I. R. 431. *Toole v. Hamilton*, [1901] 1 I. R. 383. *Roche v. M'Dermott*, Id. 394. *Healey v. A. G.*, [1902] 1 I. R. 342. *Laverty v. Laverty*, [1907] 1 I. R. 9. See *In re Moore*, [1901] 1 Ch. 36.

inalienable interest," the expression is not incorrect. If there is no one who can alienate the beneficial interest, the beneficial interest is inalienable. But in some of these cases the courts speak as if the test of the validity of such devises was their violating or not violating the Rule against Perpetuities, where Perpetuity is used in its sense of Remoteness. This it is submitted is incorrect. The vice in such devises is not that the interests of the *cestuis que trust* are too remote, but that there are no *cestuis que trust* at all.¹

§ 899. In several instances the reference to the Rule against Perpetuities is slight. Thus: "The property comprised in the devise is therefore to be taken out of commerce and to become inalienable, not for a life or lives in being and twenty-one years afterwards, but for so long as ten of the members of the society shall remain. This seems to me a purpose which the law will not sanction as tending to a perpetuity."² "The question . . . is whether the several objects of this gift are charitable. If they are charitable they are good; if they are not, they are bad as coming within the rule against perpetuity."³ "It would, I conceive, be an extreme stretch of the rule against perpetuity to hold that it applies to a gift of this sort."⁴ "The bequest" to keep up a monument "is invalid as repugnant to the rule against perpetuities. . . . A private trust cannot be created, so as to operate the inalienability of property beyond the period prescribed by the rule."⁵ "The gift there, if not charitable, must have failed, as being contrary to the rule against perpetuities."⁶ "The provision in the codicil as regards the grave undoubtedly transgresses the rule against perpetuity if it imposes an obligation to continue spending money on the grave for an indefinite time."⁷

¹ 2 Tiffany, Real Prop. § 500. See 5 Ill. Law Rev. 379; 10 Mich. Law Rev. 31, 35.

² Per Campbell, L. C., *Carne v. Long*, 2 De G. F. & J. 75, 80, quoted with approval per Kelly, C. B., in *Re Dutton*, 4 Ex. D. 54, 58.

³ Per Kindersley, V. C., *Hoare v. Osborne*, L. R. 1 Eq. 585, 587.

⁴ Per Wickens, V. C., *Cocks v. Manners*, L. R. 12 Eq. 574, 586, quoted with approval per Chatter-

ton, V. C., *In re Wilkinson's Trusts*, 19 L. R. Ir. 531, 536.

⁵ Per Clopton, J., *Johnson v. Holifield*, 79 Ala. 423, 424. See *Burke v. Burke*, 259 Ill. 262. Cf. *Matter of Fisher*, 2 Connoly, 75, and *Driscoll v. Hewlett*, 132 N. Y. Ap. D. 125, under the New York Statute.

⁶ *In re Delany's Estate*, 9 L. R. Ir. 226, 233; and so *In re Podmore*, 6 Argus Law R. (Vict.) 7.

⁷ Per Porter, M. R., *Roche v.*

§ 900. The following Irish cases should be noted more particularly: *Morrow v. M'Conville*.¹ Here a testator directed the rent of property "to be applied to the use and benefit of the Roman Catholic convent" at L. Chatterton, V. C., held that the gift was not to the members of the convent as individuals, but in trust for a non-charitable community which was incapable of taking it, and that the gift was, therefore, void within the doctrine of *Morice v. Bishop of Durham*; but he also held "that a gift, not charitable, to a religious community, including not only the existing members, but also all persons who should be, or become thereafter, members of it, during a period capable of extending beyond the legal limits prescribed by the rule against perpetuities, is void." The reason first given for the invalidity of the gift is, I submit, the correct and sufficient reason.

§ 901. *Bradshaw v. Jackman*.² In this case there was a bequest in trust for the community of a convent. Porter, M. R., said, "There are undoubtedly two senses in which the word 'community' may be used. It may mean the aggregate of the persons living in a particular place, or answering a particular description, at a given time. . . . Or it may mean the aggregate of the members of an order or institution from time to time, for ever, or so long as it continues to exist. . . . In the latter sense, a gift which in terms included in its objects persons not in existence, and who might not come into existence until a time beyond the legal limit, would be clearly void for remoteness and uncertainty, unless saved by being charitable. . . . In my opinion, there is nothing to drive me to the meaning which would make the bequest err against the rule as to perpetuities." The Master of the Rolls held, that is, that the bequest was for the benefit of a class consisting of certain specific living persons, and was therefore good; but he said that if the bequest had been for the benefit of a class which might comprise within its numbers persons not coming into existence till a remote time, it would have been bad, a *dictum* which is true enough; but the real distinction in the intention of the testator is not between a gift to a class consisting of certain individuals, and a gift to a class consisting of other individuals, but between a gift to individuals and a gift to a society as a continuing entity, abstracted from any indi-

M'Dermott, [1901] 1 I. R. 394,
399. See *Troutman v. De Boissiere*,
36 Kan. 1, 4.

¹ 11 L. R. Ir. 236, 246, 247.

² 21 L. R. Ir. 12, 17, 18.

viduals, which last is not recognized by the law as having any standing in courts, being neither a corporation nor a charity. §

§ 902. *Armstrong v. Reeves*.¹ In this case a testator gave a legacy "to the Society for the Abolition of Vivisection, payable upon the receipt of the Treasurer for the time being;" and he gave the residue of his estate "to the Society of Carlsruhe for the Protection of Animals, to be paid to the Treasurer for the time being of the said society." Chatterton, V. C., held that the gifts were charitable; and also that even if they were not charitable they were valid, because there was no indication of "an intention that the gifts received by the society shall be applied in a manner exceeding the limits which the law prescribes with regard to perpetuity." The reason first above given was a valid and sufficient ground for sustaining the trust.

§ 903. *Small v. Torley*.² A testator gave to A., "the present Roman Catholic clergyman officiating as superior" of a certain church or convent, "or the clergyman filling that office at the time of my decease, and to his successors from time to time so officiating," an annual sum of £10 for fifty years, "in trust that he or his said successors during said period" shall have mass celebrated in said church for the repose of the souls of the testator and of his wife and parents. This gift was held to be bad as a perpetuity; and so it was, using "perpetuity" in its primary sense of "inalienable interest;" but the Court (Porter, M. R.) considered and rejected the theory that this trust could be sustained for the life of the present incumbent, thus apparently assuming that if the trust had been confined to his life it would have been good. Speaking of the case of *Dillon v. Reilly*,³ the Master of the Rolls says: "It cannot be treated as a decision that in a case where words are used which purport to tie up property beyond legal limits the court will from thence carve out a life estate, hold it good to that extent, and reject the rest."

§ 904. Outside of Ireland there are five cases to notice. The first of these cases is *Hornberger v. Hornberger*.⁴ A testator gave all his estate, after the death of his wife, to a city for the benefit of its poor; "subject to the following exception, to wit: the flower garden and graveyard where my child Jettie is buried, and where I expect myself and wife to be buried . . . is not to be sold under any circumstances, but the same is vested in trust in my wife for and during her

¹ 25 L. R. Ir. 325, 337.

³ Ir. R. 10 Eq. 152.

² 25 L. R. Ir. 388.

⁴ 12 Heisk. 635.

natural life, and at her death" the city "are to act as trustees, and are to hold said graveyard and flower garden in trust, and out of my estate to keep the same up." The court held that there was a good devise for charity; they say that if the testator carved "out of the charity fund a fund for a perpetuity, which must fail, we are not at liberty, because of the dependent and illegal devise, to avoid the whole will; but, rejecting the part that is repugnant to law and public policy, we must allow the part which is lawful to be the will of the testator; that which is primary and valid must stand; that which is not primary and valid must fail." All that is said about the wife's life estate is in this sentence at the end of this opinion: "The trust to the wife of keeping up the graveyard and flower garden during her life is lawful." The nature of the proceeding, beyond the fact that it was a bill in equity, does not appear. It was not a bill for instructions, for the executrix (presumably the wife) was not the complainant. According to the reasoning of the court with reference to the city, if the trust to keep up the grave were bad, the wife would take the estate free from the trust; and it does not appear, nor is it likely, that she neglected to keep up the garden and graveyard, and that this was a suit to compel her to do so. The sentence last above quoted must therefore have been only a *dictum*. It is to be observed that no question of the Rule against Perpetuities arose in the case; it was a question not of a future but of a present interest; and the *dictum* was that one may hold property for life on an indefinite non-charitable trust; and this, it is submitted, was incorrect.

§ 905. *In re Dean*.¹ Here there was a gift in trust for the support of certain animals. North, J., speaking of a gift for the repair of a monument, said: "I know of nothing to prevent a gift of a sum of money to trustees, upon trust to apply it for the repair of such a monument. In my opinion, such a trust would be good, although the testator must be careful to limit the time for which it is to last, because, as it is not a charitable trust, unless it is to come to an end within the limits fixed by the rule against perpetuities, it would be illegal. But a trust to lay out a certain sum in building a monument, and the gift of another sum in trust to apply the same in keeping that monument in repair, say, for ten years, is, in my opinion, a perfectly good trust."²

¹ 41 Ch. D. 552, 557.

297, 901; 18 Jurid. Rev. (Scotch)

² 1 Jarm. Wills (6th ed.) 279, 136; § 909 *a*, *post*.

§ 906. On this case it is to be remarked (1) that it was not carried to the Court of Appeal; (2) that the decision was based largely on the case of *Mitford v. Reynolds*,¹ by which the judge felt himself bound, and in which the question does not appear to have been discussed; (3) that the judge did not refer to *Morice v. Bishop of Durham*; (4) that a trust for the perpetual repair of a monument is not obnoxious to the Rule against Perpetuities, for that rule relates to the creation of future interests, and has nothing to do with present interests, and that, if a trust for the repair of a monument is illegal, it is because there is no *cestui que trust* with an alienable interest, not because the trust is to begin on a remote contingency; (5) that even if a trust which can last longer than twenty-one years after lives in being were bad, then this trust for horses and dogs would be bad, because it might last conceivably for more than twenty-one years after the extinction of all *human* lives. It is a novel idea that the validity of a limitation over (or of a trust) may depend upon whether the limitation must happen (or the trust determine) within the lifetime of an animal. Can a gift over be made to take effect upon the death of any animal however longevous, — an elephant, a crow, a carp, a crocodile, or a toad? ²

§ 907. In the Weekly Notes for 1896, p. 86, is found the following note: —

“A testator, after expressing his wish to be buried in the inclosure in which his child lay in the churchyard of E., bequeathed to the rector and churchwardens for the time being of the parish church £800 Consols, to be invested in their joint names, the interest and dividends to be derived therefrom to be applied, so long as the law for the time being permitted, in keeping up the inclosure, and decorating the same with flowers. *Held*, that the gift was valid for at least a period of twenty-one years from the testator's death, and *semble* that it was not charitable. *Pirbright v. Salwey*, Aug. 6. Stirling, J.”

The case is not reported anywhere else. It is respectfully submitted that, if the report in the Weekly Notes is correct, the decision cannot be sustained. A trust for the repair of a grave is bad, not because it may last longer than lives and twenty-one years, but

¹ 16 Sim. 105.

² See 10 Mich. Law Rev. 31, 39.

because there is no *cestui que trust*; and it is not made good by confining it within twenty-one years.¹

§ 908. *Leonard v. Haworth*.² Here it was held that provisions in a will for paying the funeral expenses of the testator's surviving widow and for a gravestone for her were not necessarily avoided by the widow's having waived the provisions in the will. There seems to be no objection to a trust to pay the funeral expenses of A. who is now living, nor any reason why such trust should not be enforced at the suit of A.'s executor. But the Court says: "While a testamentary provision for the preservation, adornment, and repair of a private monument may be void as creating a perpetuity for a use not charitable, this provision is open to no such objection, as it would be completely performed upon the decease of the testator's wife." If this *dictum* suggests, and perhaps it does, that a trust for the repair of a monument during the life of a person now living would be good, it is respectfully submitted that such suggestion is incorrect.

§ 909. *Angus v. Noble*.³ Here was a trust, created by will, to last only during the lives of persons living at the testator's death. The testator directed "our graves to be kept clean." The Supreme Court of Connecticut held that this provision was obligatory upon the trustee during the continuance of the trust. It is respectfully submitted that this ruling is difficult to support.

§ 909 a. When a power is given, with a gift over, express or implied, in default of appointment, an appointment under the power is good, although there be no one who can compel the exercise of the power; there is no duty intended to be imposed on the donee of the power to exercise it. But when there is an intention to impose a duty, to create a trust, then the doctrine of *Morice v. Bishop of Durham* is that (except in the case of charities) if there is no *cestui que trust*, the trust is invalid.⁴ I think Mr. Charles Sweet has overlooked this distinction.⁵

¹ See 1 Jarm. Wills (6th ed.) 279, 901; 18 Jurid. Rev. 141; § 909 a, *post*.

² 171 Mass. 496.

³ 73 Conn. 56.

⁴ See 15 Harv. Law Rev. 509; 25 Harv. Law Rev. 1.

⁵ In 1 Jarm. Wills (6th ed.) 901, note (y); cf. *Id.* 279, note (l); 18 Jurid. Rev. (Scotch) 136, 141.

I.

CONVERSION AND THE RULE AGAINST PERPETUITIES.

§ 910. In *Rous v. Jackson*¹ personal property was given by a marriage settlement to trustees in trust for the husband and wife during their joint lives, and, on her death, if she died before the husband (which in fact occurred) as she should by will appoint. She, by will, appointed to trustees to invest the trust fund in lands to be conveyed to the use of the husband for life and on his death, from and after the decease and failure of the issue of the wife, to James Mills for life, on his death to "his issue in tail as therein mentioned," in default of such issue to Christopher John Mills for life, and on his death to the use of William John Rous, the plaintiff, for life, and on his death to the use of his first and other sons in tail male, with remainders over. This is the statement in the Law Reports and in the Law Times Reports. In the Law Journal it is said that the limitations were in favor of certain persons "including the plaintiff, W. J. Rous, for life, with remainders to their issue in tail in strict settlement." The Weekly Reporter simply says that the wife directed the property to be invested in real estate to be conveyed to the husband for life, and then settled strictly on the plaintiff. This last statement is manifestly incomplete. The probability is that the statement in the Law Reports and the Law Times Reports is correct; that James Mills had a life estate with remainder to his first and other sons in tail, &c. (that being probably the meaning of to "his issue in tail as therein mentioned") and that Christopher John Mills took only a life estate, without any limitation to his issue.

§ 911. The wife had no issue living at her death, and so the subsequent limitations took effect directly. The Law Reports and the Law Times Reports say that James Mills and William John Rous were not born at the time of the marriage settlement, but do not say whether this was the case with Christopher John Mills. The Law Journal says all the life tenants except the husband were born since the date of the marriage settlement. The wife died in 1838, the husband in 1840. Christopher John Mills died in 1855

¹ 29 Ch. D. 521; s.c. 54 L. J. Ch. 732; 52 L. T. R. 733; 33 W. R. 773.

and James Mills died in 1883 without ever having had any issue. The trust fund had never been converted into realty.

§ 912. The Court held, contrary to *Powell's Trusts*,¹ that the validity of the wife's appointment as to the question of remoteness was to be judged from the time of the appointment, and that the limitation to the plaintiff was therefore good.

§ 913. Suppose that the doctrine of *Powell's Trusts* had been followed and that the appointments of the wife had been read into the marriage settlement, what should we have? Personal property would be given to trustees in trust for the husband and wife during their joint lives, and on her death, to trustees in trust to invest the trust property in land to be conveyed to the husband for life, on his death to a person then unborn but living at the death of the wife, for life, remainder to his first and other sons, &c., in tail, remainder to another person then unborn but living at the death of the wife, for life, remainder to another person then unborn but living at the death of the wife, for life, with remainders over.

§ 914. Now if the property be considered as personal throughout, it is obvious that on the doctrine of *Powell's Trusts* the limitations after that to James Mills are bad, for the next limitations to his children in tail are to persons who may not come into being until more than twenty-one years after lives in being at the time of the marriage settlement, and although the executory limitation over to William John Rous, the plaintiff, is for life only, it might not vest till beyond the required limit.

§ 915. Suppose, however, we consider the trust property as personalty during the joint lives of husband and wife, and after that as realty, then, after the death of the wife, we have an estate for life to an unborn person followed by limitations to his first and other sons in tail, &c. This, by the doctrine of *cy pres*, would give the unborn person an estate tail followed by a life estate to an unborn person, Christopher John Mills, followed again by a life estate to another unborn person, William John Rous, the plaintiff, but as both these persons are given vested interests at the death of the wife, their estates are not too remote. Therefore, on this latter theory, the limitation to the plaintiff is good even if the doctrine of *Powell's Trusts* is applied.

§ 916. If, therefore, the assumption in *Rous v. Jackson* that the doctrine of *Powell's Trusts* would invalidate the appointments, is

¹ 39 L. J. Ch. 188. See §§ 526 *et seq.*, *ante*.

correct, it must be that the direction to convert personalty into realty at a future time cannot affect the remoteness of limitations, and that their validity must be determined as if the property was to remain personalty throughout.¹ This proposition, however, seems doubtful. And in *Becker v. Chester*² real estate was devised to trustees to convert and apply the proceeds upon certain trusts. The Supreme Court of Wisconsin held that in that State future limitations of real estate were governed by statute, but future limitations of personalty neither by statute nor by the common-law Rule against Perpetuities; and that the trusts were good, although such trusts of unconverted realty might have been bad.³ And so in Minnesota.⁴

§ 917. Where there is a duty on a trustee to convert realty into personalty, the supposed rule against "double possibilities" does not apply.⁵

J.

CONTINGENT REMAINDER OR CONDITIONAL LIMITATION.

A FUTURE LIMITATION WHICH CAN TAKE EFFECT AS A CONTINGENT
REMAINDER MUST TAKE EFFECT AS SUCH AND CANNOT TAKE
EFFECT AS A SPRINGING OR SHIFTING USE OR AN EXECUTORY
DEVISE.

§ 918. Before the Statute of Uses and the Statute of Wills, the only future limitations which an owner in fee simple could create were

¹ The circumstance that the property was not in fact converted seems immaterial.

² 115 Wis. 90.

³ *Becker v. Chester* was followed in *Danforth v. Oshkosh*, 119 Wis. 262; and *Kavanaugh's Will*, 143 Wis. 90. See *Dodge v. Williams*, 46 Wis. 70; *Gould v. Taylor Orphan Asylum*, Id. 106; *Webster v. Morris*, 66 Wis. 366. But where a testator directed land to be sold only at the expiration of twenty years from his death the gift of the income

during the twenty years and of the proceeds of the sale were held to be alike void as violating the statute concerning land. *De Wolf v. Lawson*, 61 Wis. 469. Cf. *Penny v. Croul*, 76 Mich. 471; *Lounsbury v. Trustees of Burial Association*, 170 Mich. 645, § 751, *ante*; *Bates v. Spooner*, 75 Conn. 501.

⁴ *Young Men's Christ. Assoc. v. Horn*, 120 Minn. 404.

⁵ *Fonseca v. Jones*, 21 Manitoba, 168, 184. See § 295, *ante*.

remainders. A remainder must come into possession on the termination of the preceding estates. Thus, upon a conveyance to A. for life, and one year after A.'s death to B., the limitation to B. was not a remainder, and was a void limitation. This was because freehold estates could be created only by livery of seisin, and though the property in land could be cut up into present and future estates, there must be a livery of seisin for each estate unless the estates were continuous; if they were continuous, the livery of seisin of the first estate was deemed sufficient for them all. Therefore a contingent remainder, that is, a remainder subject to a condition precedent, could not take effect unless the condition was fulfilled during, or at the termination of, the preceding estates.

§ 919. Under the Statutes of Uses and of Wills, remainders created by way of use or by devise had all the incidents of remainders created by common law, but under those Statutes future estates could be created which were not remainders, and which could take effect without regard to any preceding estates. These estates were called springing or shifting uses or executory devises. Thus, upon a devise to A. for life, and one year after A.'s death to B., though the devise to B. was not good as a remainder, it was good as an executory devise.

§ 920. A rule of law was early established that if the condition or event on which a future estate was to vest might occur during, or at the termination of, the particular estates, such future estate was to be held a contingent remainder and not an executory devise. This rule seems to have been first laid down by Lord Hale in *Purefoy v. Rogers*.¹ He says: "Where a contingency is limited to depend on an estate of freehold which is capable of supporting a remainder, it shall never be construed to be an executory devise, but a contingent remainder only, and not otherwise."

§ 921. And this doctrine has been repeatedly laid down and followed, as by Lord Northington in *Carwardine v. Carwardine*,² where he says: "It is a certain principle of law, that wherever such a construction can be put upon a limitation, as that it may take effect by way of remainder, it shall never take place as a springing use or executory devise;" by Lord Mansfield in *Goodtitle v. Billington*;³ by Lord Kenyon in *Doe d. Mussell v. Morgan*,⁴ where he says: "If ever

¹ 2 Wms. Saund. 380, 388.

³ Dougl. 753, 758.

² 1 Eden, 27, 34.

⁴ 3 T. R. 763, 765.

there existed a rule respecting executory devises which has uniformly prevailed without any exception to the contrary, it is that which was laid down by Lord Hale;" by Lord Ellenborough, in *Doe d. Scott v. Roach*,¹ where he says: "As circumstances stood when the will was made the limitation to Mary Dennett's children must have been construed a contingent remainder, not because the testatrix meant it to operate in that particular mode, that is, by contingent remainder, nor because her intention would be most effectually carried into effect by treating it as a contingent remainder, but because it is a rule of law that no limitation shall operate by way of executory devise, which, at the time of the testator's death, was capable of operating by way of contingent remainder;" by the Court of Common Pleas in *Doe d. Planner v. Scudamore*; ² and by the Court of King's Bench in *Doe d. Herbert v. Selby*.³ And Lord St. Leonards in *Cole v. Sewell*,⁴ says: "Now, if there be one rule of law more sacred than another, it is this, that no limitation shall be construed to be an executory or shifting use, which can by possibility take effect by way of remainder."⁵

§ 922. A series of cases has brought this doctrine into prominence: *Brackenbury v. Gibbons*.⁶ Devise to A. for life, and on her death to the children of B. who either before or after B.'s death should attain twenty-one or die under that age leaving issue living at his, her, or their deaths. At the death of A. two children of B. had attained twenty-one; other children of B. attained twenty-one subsequently. Hall, V. C., held that the case was covered by authority, and that the children and only the children who had reached twenty-one at the death of A. were entitled.

§ 923. *In re Lechmere & Lloyd*.⁷ Devise to A. for life, and on her death to such of her children living at her death as either before or after her decease should attain twenty-one or marry. A. died leaving seven children, of whom five had attained twenty-one and two were infants. Jessel, M. R., refused to follow *Brackenbury v. Gibbons*.

¹ 5 M. & S. 482, 491, 492.

² 2 B. & P. 289, 296, 297, 298.

³ 2 B. & C. 926, 930.

⁴ 4 D. & War. 1, 27.

⁵ See Fearn, C. R. 388-395; Smith, Exec. Int. 71, 72; Theob. Wills (7th ed.) 649; Wms. Real

Prop. (22d ed.) 386; 21 Law Quart. Rev. 129; see also *Burleigh v. Clough*, 52 N. H. 267, 273; *Hayward v. Spaulding*, 75 N. H. 92.

⁶ 2 Ch. D. 417 (1876).

⁷ 18 Ch. D. 524.

He said that the gift could not take effect as a remainder to those children who had not attained twenty-one. "If the devise be to A. for life, and after her death simply to a class of children who shall attain twenty-one or marry, I agree that those members of the class who have not attained twenty-one or married at the death of the tenant for life, though they may do so afterwards, cannot take, according to the rule in *Festing v. Allen*;¹ but here we have two distinct classes as the objects of the devise, the one being children living at the death of the tenant for life, and attaining twenty-one or marrying *before* the death, and the other being children living at the death, and attaining twenty-one or married after the death. . . . To enable the second class to participate it is necessary to read the gift to them as an executory devise. The rule is that you construe every limitation, if you possibly can, as a remainder, rather than as an executory devise. It is a harsh rule: Why should I extend it? . . . The devise in this case could not take effect as a remainder in respect of those children who survived the tenant for life but had not attained twenty-one at her death, and must, therefore, in order to let in those children, be construed as an executory devise." He held that the children who had reached twenty-one could not make a good title.

§ 924. *Miles v. Jarvis*² is a case similar to *In re Lechmere & Lloyd*. Kay, J., followed that decision. He said there was "an executory devise and not a contingent remainder." *Re Bourne*³ is a decision to the same effect. Kay, J., says he followed *In re Lechmere & Lloyd* "with great satisfaction." "The rule, which is an arbitrary rule, that you must construe a limitation as a contingent remainder if that construction is possible, is one which often produces great injustice and hardship, and I cannot help being glad to see that a distinction of this kind has been established." *Dean v. Dean*⁴ was similar to *In re Lechmere & Lloyd*, and Chitty, J., followed that case. He said: "Where the limitation is to children who either before or after the death of the tenant for life attain the age of twenty-one, the testator expressly attaches the qualification of membership of the class to those children who attain the age after the tenant for life's death, and, in order to give effect to the express and lawful limita-

¹ 12 M. & W. 279.

³ 56 L. T. R. 388.

² 24 Ch. D. 633 (1883).

⁴ [1891] 3 Ch. 150.

tion in favor of such children, the court is bound to hold that the limitation taken in its entirety is an executory devise." In *Symes v. Symes*¹ a limitation on the death of a life tenant to such of a class as should attain twenty-one was held a contingent remainder, and *In re Lechmere & Lloyd* was distinguished.

§ 925. Passing over for the moment *In re Wrightson*, we come to *White v. Summers*.² Devise to A. for life, to his eldest and other sons successively in tail male, and in default of such issue to the eldest or other son of B. who should first attain twenty-one. A. died without issue. At his death C., the eldest son of B., was a minor. He afterwards attained twenty-one. Parker, J., in an admirable opinion, which deserves the closest study, held that C. had a contingent remainder which failed. He showed that the rule that a limitation which can take effect as a contingent remainder cannot take effect as a springing use or executory devise is a positive rule of law; and that whether the testator intended the limitations to take effect in this way or that is immaterial, unless his language can be construed as expressing an intention to make alternative gifts, one as a contingent remainder and the other as an executory devise. One may doubt whether a gift to A. for life and on his death to such of a class as before or after A.'s death should attain twenty-one would be construed as containing alternative gifts, unless it were to avoid an obnoxious rule of law, but it is a possible construction, and on it Parker, J., explains *In re Lechmere & Lloyd* and the cases which have followed it.

§ 926. Going back now to *In re Wrightson*.³ A devise in a will, under the circumstances which had happened, was to A. for life, remainder to C., the first son of B., for life, with remainders to his sons successively in tail male, remainder to D., the second son of B., for life, remainder to his sons successively in tail male, with limitations over. A codicil provided that no devisee of any real estate under the will should have a vested interest therein or be entitled to the possession of the same until he attained twenty-four. A. and C. died, the latter leaving a son E. who was a minor. According to the will E. was entitled to possession as tenant in tail male. What was the effect of the codicil? Did it turn what, under the will, would be a vested remainder in E. into a contingent remainder or into an exec-

¹ [1896] 1 Ch. 272.

³ [1904] 2 Ch. (C. A.) 95.

² [1908] 2 Ch. 256.

utory devise? The Court held that it changed it into an executory devise. The Court of Appeal certainly seems to have thought that the rule could be relaxed by showing that the testator intended the gift to take effect, though the contingency did not occur until after the termination of the particular estate. In face of the reasoning in *White v. Summers*, it seems difficult to sustain this conclusion. Parker, J., in the latter case, felt the difficulty. His explanation of *In re Wrightson* is not very satisfactory.

§ 927. *Simonds v. Simonds*.¹ A. by deed granted land to B. and his heirs, reserving to himself the right to cut timber, to hold to B. for life, remainder to such of the children of B. as should reach twenty-one, so that neither A. nor his heirs nor any person claiming under him should have any estate, right, title, or interest in the land except as aforesaid. B. died leaving five children, two of age and three minors. The Court held that the devise to B.'s children was a springing use and not a contingent remainder. The Court says: "There is nothing at variance with this view in the well settled rule that a limitation, if it can so operate, is to be construed as a remainder, and not as an executory devise, even if the rule be conceded to apply with equal force to springing and shifting uses. That rule is adduced to give effect to the intent of the maker and carry out the terms of the instrument. Its invocation here could only thwart that intent and defeat those terms. Hence it has no application." That is: The rule exists to carry out intention, and therefore cannot be used to defeat intention. But, with submission, as appears from the opinions of Lord Hale, Lord Northington, Lord Kenyon, Lord Ellenborough, and Lord St. Leonards, cited, and the demonstration in *White v. Summers*, the object of the rule had nothing to do with intention. The rule originated in the dislike of judges to limitations brought in by the Statutes of Uses and Wills. This dislike may have been unreasonable and arbitrary, but a positive prescription of law was established, and not a rule of construction.

§ 928. When a positive rule of law has become obnoxious to the Courts, they may deal with it in three ways:

First. They may follow it and leave it to the Legislature to alter it;

Second. They may say it is unsuited to modern conceptions and may disregard it;

¹ 199 Mass. 552.

Third. They may change it from a positive rule of law to a rule of construction.

§ 929. The First may be the best; but something can be said for the Second. The rule in this case had its origin in the dislike of uses which is so forcibly expressed in the preamble of the Statute of Uses. This dislike was fully shared by the judges, they called uses impious, and in *Chudleigh's Case*, and also in laying down the rule in question, they were striving to limit their creation. That was the *raison d'être* of this rule, not perhaps a very wise reason, but still a reason. That has now all passed away. No one thinks uses impious. They are employed harmlessly in ordinary conveyances. Indeed, it takes no ordinary exercise of historical imagination to realize the state of mind which prevailed when the rule in question was thought of value. And it may perhaps fairly be said, *cessante ratione, cessat ipsa lex*.

§ 930. But the Third plan, that of treating the rule as a rule of construction, which is adopted probably in *In re Wrightson*, and certainly in *Simonds v. Simonds*, seems the least desirable of the three. Regarded as a rule of positive law, there was a reason for the rule, not perhaps at our day a very convincing reason, yet still a reason; but, regarded as a rule of construction, there is no reason or sense in it, it is purely arbitrary. An arbitrary rule of construction, a rule without a reason, is a bad thing; to such rules and the attempt to escape from them is largely due the chaotic mass of cases which is an *opprobrium* to the law of wills and settlements. The Rule in *Shelley's Case* is the best instance. That rule is a simple, positive rule of law. The Courts tried to treat it as a rule based on intent, and the result was that welter of decisions of which Lord Eldon, the acutest of mortals, said, "The mind is overpowered by their multitude and the subtlety of the distinctions between them;" and deliverance from which has been finally gained only by recognizing that the rule is not a rule to carry out intent, but a rule to defeat it.¹

¹ It may be suggested that the result reached in *Simonds v. Simonds* can be defended on the following ground:

The Statute of Uses turns uses into legal estates when a man is seised to the use of *others*. When a conveyance is made to a man and his heirs to the use of himself and his

heirs, he has the fee, not by virtue of the Statute, but at common law. *Doe d. Lloyd v. Passingham*, 6 B. & C. 305.

In a conveyance which operates as a feoffment, it is usual to insert the recital of a consideration and also a declaration of a use to the grantee, but this is to rebut the

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WHITBY v. MITCHELL.¹

§ 931. The case of *Whitby v. Mitchell*² set forth this doctrine: The rule that a contingent remainder for life to an unborn person

presumption of a resulting use to the grantor. Even if, before the Statute of Uses, a man could have a use against himself, such use would not have been turned by the Statute into a legal estate, and therefore no following limitation could possibly take effect as a contingent remainder, for there would be no legal estate to support it, and it would therefore be a springing use.

And further, it is not easy to see how a man could have a use against himself, any more than he can make a grant to himself or make a contract with himself. Such a use would seem to be simply void. See the opinions of the judges in *Abbiss v. Burney*, 17 Ch. D. 211.

The difficulty with this suggestion is that it was early said that the Statute of Uses would be "beneficially expounded," so that when A. covenanted to stand seised to the use of himself for life, remainder to others, A. would take a life estate. The beneficent exposition being apparently that when a man was seised to the use of himself and also of others, the Statute executed all the uses. "If a man seised of lands in fee simple,

by deed covenants with another that he and his heirs will stand seised of the same land to the use of himself and the heirs of his body, or unto the use of himself for life, the remainder over in fee; in that case, by the operation of the Statute, the estate which he hath at the common law is divested and a new estate vested in himself, according to the limitation of the use." *Sammes's Case*, 13 Co. 55 (1609). This *dictum* and the case of *Pibus v. Mitford*, 1 Vent. 372, seem to be the only judicial authorities for the proposition.

In the report of *Sammes's Case*, Ley, 11, there is no such *dictum*, and in *Orme's Case*, L. R. 8 C. P. 281, 288, 289, Bovill, C. J., said it was very ambiguous and was not necessary to the decision of the case; and see *Id.* pp. 302, 303.

The twelfth and thirteenth volumes of Lord Coke, it must also be remembered, were posthumous and bear a very indifferent reputation. In *McPherson v. Daniels*, 10 B. & C. 263, 275, Parke, J., said: "The 12 Rep. is not a book of any great authority. It is said by Mr. Hargrave, 11 St. Tr. 30, to be of small authority, being not only posthumous, but apparently noth-

¹ The substance of this Appendix, with the exception of the

note added at the end, was printed in 29 Law Quart. Rev. 26-32.

² 42 Ch. D. 494; 44 Ch. D. 85.

cannot be followed by a remainder to such person's child is a rule of law prior to, and independent of, the Rule against Perpetuities, and still exists; and therefore a remainder to such child is void, although it must take effect, if at all, within lives in being, and so is not in violation of the Rule against Perpetuities.

§ 932. My learned friend, Mr. Charles Sweet, published an article in the *Law Quarterly Review*¹ defending *Whitby v. Mitchell*. I ventured in the second edition of this book of mine on the Rule against Perpetuities to comment adversely upon this article. Since then Mr. Sweet has written fully on the subject, both in his valuable editions of *Jarman on Wills* and *Challis on Real Property*, and in articles in the *Columbia Law Review* and the *Juridical Review*.² I have read carefully what Mr. Sweet has written, and although my conclusion on the main question remains unchanged, I do not think I did full justice to his views, particularly as now developed. I will try to state more specifically my objections to them.

§ 933. The reason ordinarily given for the alleged rule is that the law will not allow a possibility upon a possibility. Mr. Sweet rejects this reason emphatically, I may say with contempt.³ But he believes

ing more than a collection from papers neither digested nor intended for the press by the writer. And Mr. Sergeant Hill, in his copy, refers to fo. 18, 19, as showing that the 12 Rep. was not fit to be allowed. And Holroyd, J., in *Lewis v. Walter*, 4 B. & A. 614, gives an opinion unfavorable to its accuracy."

Pibus v. Mitford, Lord St. Leonards says, in his note to *Gilbert on Uses*, 35, has been often denied.

But that if a man is seised in fee to the use of himself for life, he has a legal life estate, is laid down in a long series of treatises of reputation. *Bacon on Statute of Uses*, 7 *Bacon's Works* (ed. Speddings's) 440. *Gilbert, Uses* (ed. Sugd.) 35. 1 *Cruise, Dig.* (4th ed.) 357. *Burton, Compendium of Real Prop.*,

§§ 158, 160. *Preston, Estates*, 179. 1 *Sanders, Uses* (5th ed.) 91 *et seq.* *Leake, Land Law*, 119. See *Doe d. Lloyd v. Passingham, ubi supra*. But cf. *Orme's Case*, L. R. 8 C. P. 281.

Whether these statements of the text-writers are, as my colleague Professor E. H. Warren is inclined to think, a *cantilena* of lawyers based on insufficient authority, and contrary to fundamental doctrines, or whether *communis error fecit jus*, I leave to the judgment of the learned reader.

Cf. note on *Evers v. Challis*, 18 Q. B. 224, 231, 7 H. L. C. 531, § 338, note 3, p. 315, *ante*.

¹ 15 *Law Quart. Rev.* 71.

² 12 *Columbia Law Rev.* 199; 18 *Jurid. Rev.* 132.

³ "This theory may be treated as exploded." *Challis, Real Prop.*

there is another sufficient reason for the present existence of the alleged rule.

· § 934. Mr. Sweet's view is:

1. The judges had a dislike to the tying up of property.

2. This dislike, at least since *Mary Portington's Case*,¹ was put in the concrete form of a rule that no tenant in tail could be prevented from barring his estate.

3. An estate tail which could not be barred was often called a "perpetuity."

4. Devices were employed to evade the rule as to estates tail, but such devices were condemned and disallowed by the Courts as "tending to a perpetuity."

5. These devices were of two kinds:

First. Estates for life were given to a man and his heirs in successive generations as purchasers.

Second. A term for years was devised with a proviso that if the devisee died without issue there should be a limitation over.

Thus far I agree — I suppose every one will agree — with Mr. Sweet.

§ 935. Unless implied in the treatment of those devices, there is no evidence that, before the Rule against Perpetuities was established, a rule that a remainder to the child of an unborn person following a remainder for life to such person was void, was formulated; and the case of *Manning v. Andrews*² is an authority the other way.

(3d ed.) 206. "No definite or intelligible rule against double possibilities ever existed." 1 Jarm. Wills (6th ed.) 287, note (b). To the theory of the prohibition of a possibility upon a possibility as the explanation of the alleged rule, "there are two objections: in the first place, it is historically inaccurate, and in the second place, it tends to obscure the true nature and scope of the rule." 12 Columbia Law Rev. 200. "The doctrine of double possibilities . . . never had any real existence; it perished almost as soon as it drew breath."

216. "The 'stigma' of the doc-

trine of double possibilities." Id. 219. And see *per* Farwell, J., in *In re Ashforth*, [1905] 1 Ch. 535, "I do not think that much reliance can be placed on the existence of an independent rule of law forbidding a possibility on a possibility. The phrase seems due to Lord Coke's unfortunate predilection for scholastic logic, and may possibly be a pedantic and inaccurate reason for avoiding remoteness;" and *In re Nash*, [1910] 1 Ch. 1, 9, 10.

¹ 10 Co. 35 a.

² 1 Leon. 256. See §§ 132, 132 a, *ante*.

Mr. Sweet¹ says: "It may safely be said that there was no express rule to that effect [forbidding the limitation of land in remainder to the children of an unborn child after an estate for life given to that unborn child], but there is nothing to show that such a remainder would have been allowed by the judges." That is just what I say. I have never denied that if such a case had been presented to the judges they would, it is very likely, have invented some rule to meet it. What I have insisted on is that no such rule had been formulated before the Rule against Perpetuities.

§ 936. Therefore, if the rule in question existed, it must have been by reason of the manner of treatment by the Courts disallowing one or both of the two devices.

§ 937. As to the *first* device, it is not clear how the Courts treated it. All that we know about the matter are *dicta* of Chief Justice Popham in *Chudleigh's Case*,² and a passage from the Touchstone based on Popham, C. J.'s, *dicta*,³ which were unearthed by Mr. Sweet. The *dicta* attributed to the Chief Justice are these. He said: "If a feoffment be made to the use of A. for life, and after to the use of every person who should be his heir, one after another, for the term of the life of every such heir only: in this case if this limitation should be good, the inheritance would be in nobody; but this limitation is merely void, for the limitation of a use to have a perpetual freehold is not agreeable with the rule of law in estates in possession." And again: "If the said case before put of a perpetual freehold should be maintained, that no heir shall have but an estate for life and that the inheritance shall be in nobody, what escheat, or ward, or heriot, or other profit, will accrue to the King or other Lords?" What the Touchstone says is this: "Uses that are against the rules of the common law shall not be executed by this statute: and therefore, if a feoffment be made to the use of A. for life, and after to the use of every person that shall be his heir, one after another, for the term of his life . . . these uses shall not be executed, because these limitations shall be wholly void." It is not entirely clear what these passages mean. Perhaps they mean that all the uses are void, and there is a resulting use to the feoffor in fee; but what seems more probable is that the Court thought that A. had a fee, and that his heirs must take

¹ 12 Columbia Law Rev. 215,
216.

² 1 Co. 120 *a*, 138 *a*, 139 *b*.

³ Shep. Touch. 268.

by descent and not by purchase.¹ However this may be, one thing, it is confidently submitted, is certain, that the Court did not mean to say that A. would take a life estate, that his heir would take a life estate, and that then there would be a resulting use to the feoffor.²

¹ "If a man makes a feoffment in fee to the use of A., his son, for life, and afterwards to the use of every person that shall be his heirs (*sic*), for life only, it is not good to the heir, for it is against the rules of common law that a perpetual freehold for life only should descend, because it creates a perpetuity; but it seems in this case as if the Chancery (since there is supposed a good consideration) would have executed a fee in A., according to the intent of the parties." Gilb. Uses, 77.

² I must call attention to a very curious case to which I was directed by Wms. Real Prop. (22d ed.) 418, note (*i*), but which has not, to my knowledge, been remarked upon. In Perrot's Case, Moore, 368 (1594), there was a feoffment to the use of A. for life, and on his death to the use of his first son for life, and then to the first son of such first son for life, and then to the use of all and single A.'s sons and male issue. The argument of Coke, A. G., is thus reported: "To prove such limitation of perpetual freeholds to be void of land in possession, he vouches a case reported by Justice Windham in the Common Bench in 26 & 27 Eliz. Regina, Rot. 343 or 323, and adjudged Trin. 27 Eliz. in an action of waste by Leonard Lovelace against Tho. Lovelace, where it appeared that the land, being gavelkind, was devised to one and his eldest issue male, and so from

heir male to heir male for ever, and it was adjudged that this was an estate of freehold in remainder to all the heirs male who *shall be born and in esse during the continuance of the particular estate in possession*, and no further. . . . To this intent also he vouches Haddon's Case, 28 or 18 Eliz. Regina, Rot. in the Common Bench, where the case was that Haddon devises to one for life, and so afterwards to each person who should be his heir, for life, and this was adjudged an estate in possession to the one, and remainder for life to the next heir, and nothing further. . . . Wherefore he concludes this point that the estate of freehold in remainder is good to him and each son who was *in esse* during their lives, and so of all the other persons in the remainder to their sons."

He therefore lays down what is the Rule against Perpetuities as governing Lovelace *v.* Lovelace; the alleged rule in question as governing Haddon's Case; and again, it would seem, the Rule against Perpetuities in the case at bar. But Lovelace *v.* Lovelace, 1 And. 132, Cro. El. 40, Sav. 75, 2 Leon. 35, did not raise the question; and Haddon's Case does not seem to be reported; and the report of Coke's argument, Moore, 372, continues: "But because this point of perpetual freehold does not tend to final judgment of the case in question, he proceeds to the other points more material;" and the

§ 938. As to the *second* device. There seems to have been a doubt, in the sixteenth century, whether in a devise of a term for years a limitation over, on failure of issue, was good or bad,¹ but at the beginning of the seventeenth century came the case of *Child v. Baylie*.² Here there was a devise of a term to A. and his assigns, provided, that if A. died without issue living at his death, then the term should go to B. The devise over to B. was held bad. Now this was certainly a decision that a gift over of a term for years on the default of issue was bad, as making land inalienable. The Court says the limitation was void because a term cannot be entailed; because it was the gift of a possibility upon a possibility; because, if the gift to B. was good, it could not be barred by A., and thus future interests in chattels would be less destructible than they were in freeholds; and because, if the law will not suffer such perpetuities of inheritances, then much less will it suffer perpetuities of chattels; that is, the Court condemned the devise as an attempt to evade the rule of law that estates tail are barrable.

§ 939. It is not entirely easy to see why a rule that a remainder to the child of an unborn person following a remainder for life to such person is void is, logically or otherwise, the result of a rule that in a devise of a term for years a gift over on failure of issue is void; but let us assume that it is.

§ 940. At the argument in *Child v. Baylie*, Davenport, counsel for the losing party, who may be regarded as the father of the Rule against Perpetuities, made, it would seem, this contention:³ On a devise of a term for years a limitation over on the death of the first devisee is good; now, a gift over on the death of the first devisee without leaving issue at his death is no more remote (*forrein*), and therefore it should be held good; it is a question of remoteness. But the Court said: "No." Their reasoning appears to have been this: It is not a question of remoteness; remoteness has nothing to do with the matter; the limitation over is bad because it is an attempt to entail a term, to do, by granting a term, what you cannot do by giving an estate tail; an estate tail cannot be made unbarrable; you cannot make an estate

judges decided the case on a point of pleading "sans examining l'auters points del case." Perrot's Case, *ad fin*, Moore, 391.

¹ §§ 153, 154, *ante*.

² Cro. Jac. 459; Palm. 48, 333; W. Jones, 15; 2 Roll. 129. See Duke of Norfolk's Case, 3 Ch. Cas. 1, 34.

³ Palm. 334.

tail unbarrable in the hands of the first tenant, any more than in the hands of any later tenant; a limitation over on the death of a first tenant without issue living at his death is no better than such a gift over on the death of any other tenant. The judgment was the judgment of all the judges with one exception, and further, it was approved by the heads of the three superior Common Law Courts and by Lord Keeper North, reversing Lord Chancellor Nottingham.

§ 941. Standing on these authorities, there was a rule that a limitation over on dying without issue was void, without regard to the question whether the dying without issue was or was not remote; and, on the assumption that the invalidity of a remainder to the child of an unborn person after a remainder for life to such person is a logical result of this rule, then such a remainder to the child is void, independently of the Rule against Perpetuities, and without reference to the remoteness of limitations.

§ 942. But the doctrine of *Child v. Baylie*, and, with it, its supposed result, was modified by the House of Lords, sustaining Lord Nottingham's decision, in *The Duke of Norfolk's Case*, which holds that such limitations are not objectionable if they are not remote. It may be that Lord Nottingham's decision was a pretty bold piece of judicial legislation, and the members of the House of Lords may have been as little versed in the law as they were in *Lloyd v. Carew*,¹ but the decision has stood ever since, and is law wherever the English Common Law now prevails.

§ 943. Mr. Sweet also relies on *Humberston v. Humberston*.² In 1717, A. devised his estate to trustees in trust to convey to B. for life, and then to B.'s first son for life, and so to the first son of that first son for life, &c., and if no issue male of the first son, then to the second son of B. for life, and to his first son, &c., and on failure of such issue of B., then to C. for life, and to his first son for life, &c., with remainders over for life to other persons for their lives successively, and their respective sons, when born, for their lives, without giving an estate in tail to any of them or disposing of the fee. Lord Cowper, C., said that an attempt to make a perpetuity for successive lives was vain. This was thirty odd years after the Rule against Perpetuities was established. The Chancellor had no authority to disregard

¹ Show. P. C. 137. See § 178, ² 1 P. Wms. 332.

the decision of the House of Lords in *The Duke of Norfolk's Case*, and, I respectfully submit, there is no reason to suppose that he intended to do so and to fall back upon the unmodified doctrine of *Child v. Baylie*.

§ 944. The novel thing done by Lord Cowper, C., in *Humberston v. Humberston* was the introduction of *cy pres*. The justification of this was, *first*, that the case was one of executory trust, and that in such a case the trust can be executed to carry out the intention of the parties, as in the more common case where an executory trust is so executed to avoid the application of the Rule in *Shelley's Case*; and *secondly*, that it was not then clearly settled that the construction of a will could not be altered to avoid the application of the Rule against Perpetuities. It is true that though it is now settled that the Rule against Perpetuities ought not to be allowed to affect construction, yet the doctrine of *cy pres* still continues, and, what is more, is applied to executed trusts and to legal estates. But it has been regarded with disfavour by the most eminent judges, and must fairly, it is submitted, be said to be an anomalous exception to the Rule against Perpetuities.¹

§ 945. To sum up:

1. The dislike of the Courts to the tying up of land was formulated in certain rules, for instance, that no tenant in tail could be restrained from barring the estate tail.

2. There is no evidence of the establishment of a rule, prior to the Rule against Perpetuities, that after a life estate to an unborn person a remainder to his child is void, unless it is implied in the doctrine of *Child v. Baylie* that a limitation of a term after a failure of issue is void without regard to its remoteness.

3. The Rule against Perpetuities modified this doctrine of *Child v. Baylie*, by providing that no limitation is void unless it is too remote, and therefore the limitation to the child of an unborn person is not void unless it is too remote.

4. The idea that such remainder to said child is void continued to exist because of the notion that a possibility upon a possibility is void, a notion which Mr. Sweet repudiates.

5. A decision that such remainder is void, apart from the doctrine of remoteness established by the Rule against Perpetuities, was first made in *Whitby v. Mitchell*.

¹ See § 877, *ante*.

§ 946. No one that I am aware of claims that public policy calls for the Rule in *Whitby v. Mitchell*, or that such policy requires contingent remainders to be subjected to a fetter which is not imposed upon other future interests. The Rule is maintained only as an alleged relic of antiquity which many eminent men have believed to be genuine.

§ 947. I have said that if a case of a remainder to the unborn child of an unborn child had come before the Courts, they would, it is very likely, have made some rule to strike it down. But further than that, I concede that if the case had come before them at the beginning of the seventeenth century they would not improbably, in the spirit of *Child v. Baylie*, have laid down a rule like that in *Whitby v. Mitchell*, and that Popham, C. J., would have supported it on the ground that the remainder was a possibility on a possibility. But fortunately the case did not come before the Courts; and towards the close of that century, in *The Duke of Norfolk's Case*, the House of Lords, following the lead of an enlightened and brave judge, overthrew *Child v. Baylie*, and, unhampered by scholastic notions, placed the law of future interests upon a rational basis.¹

¹ Mr. Sweet has replied to this, 29 Law Quart. Rev. 304, but his article does not seem to contain anything which calls for additional remark.

To place the rule in *Whitby v. Mitchell* on a rational ground, it would seem to be necessary to treat it as a particular application of some general rule against "double contingent remainders." The court in *Whitby v. Mitchell* so treated it; and so have the courts in most of the cases in which it has been referred to, although without defining such general rule. Moreover, if contingent remainders, as Mr. Sweet contends, are not subject to the Rule against Perpetuities, it seems almost necessary to have some such general rule, which would include the particular case in *Whitby v. Mitchell*. (Though Mr. Sweet

thinks that it would not do so, because the rule in *Whitby v. Mitchell* should apply to executory devises, a view in which he seems to stand alone. See 12 Columbia Law Rev. 201.) It therefore seems superfluous and confusing to treat that case as standing upon a special doctrine. In *In re Park's Settlement*, [1914] 1 Ch. 595, the Court attempted actually to apply such a general rule; the result is absurd, as Mr. Sweet concedes. A limitation by deed of freehold property to the issue of a bachelor, after a life estate to his widow, was held void, on the ground that as the widow might be a person not born at the date of the deed, the limitation to her children would be to the unborn issue of an unborn parent; notwithstanding the evident fact that the remainder to the

L.

GENERAL TESTAMENTARY POWERS AND THE RULE
AGAINST PERPETUITIES.¹

§ 948. How does the Rule against Perpetuities affect appointments under general testamentary powers? Or, to put the question in a con-

issue would be vested at the death of the father.

Mr. Sweet, in his latest articles upon this subject, 30 Law Quart. Rev. 135, 353, attempts to define the supposed rule against "double contingent remainders," treating it as distinct from the rule in *Whitby v. Mitchell*; but in order to do so he is compelled to disapprove *In re Park's Settlement*, the only case squarely decided on such a general rule, and the language of the Court in *In re Frost*, 43 Ch. D. 346, and *Whitting v. Whitting*, 53 Sol. J. 100, which the Court, in *In re Park's Settlement*, with entire consistency, considered to lead to the decision there made. "Having regard to these authorities it is difficult to see how the learned judge could have decided differently, but the result is unsatisfactory, not to say absurd." 30 Law Quart. Rev. 135. If *In re Park's Settlement* is regarded as an application of the identical doctrine which was applied in *Whitby v. Mitchell* (and this appears to have been the Court's own view), the result is likewise absurd. See 27 Harv. Law Rev. 752. The state of affairs seems to be, therefore, that the English courts, from *Whitby v. Mitchell* to *In re Park's*

Settlement, have attempted to apply an ill-defined rule against double contingent remainders, which they have not clearly distinguished from the old discredited rule against "a possibility on a possibility," and have finally arrived at absurd results. Mr. Sweet, on the other hand, after long cogitation and "some hesitation," and by the exercise of much acuteness in drawing distinctions, has elaborated two independent rules (and perhaps a third, of whose existence he is not sure) which are fairly definite and logical, and not absolutely inconsistent in theory with each other or with the Rule against Perpetuities,—but which do not agree with the cases. Limitations which Mr. Sweet, and every one else, has always supposed were good (e. g., those in *In re Park's Settlement*), the latest cases say are bad. Limitations which Mr. Sweet says would be bad (e. g., an executory devise, not objectionable under the Rule against Perpetuities, to the children of an unborn person, following an executory devise to their parent), the cases, at least by implication, and the modern text-writers, except Mr. Sweet, treat as good. This condition of things shows the danger of at-

¹ These remarks were first published 26 Harv. Law Rev. 720 with

the exception of the notes at the end of §§ 962 and 969, *post*.

crete form: If personal property is bequeathed in trust to pay to such person as A. shall by will appoint, and A. appoints by will to B., who was not living at the death of the testator, for life, and on B.'s death to his children, is the appointment to B.'s children good? ¹

§ 949. I have expressed the opinion that such appointment is bad.² My learned friend, Professor Kales, in an article which he kindly communicated to me, and has now published,³ thinks that the appointment is good. Mr. Kales's suggestions on the law deserve so much respect, and to me personally have been so often valuable, that I am moved to say a word or two why I cannot adopt them in this matter.

§ 950. In judging of the remoteness of an appointment, the time must be calculated from the date of the creation of the power and not from the date of its execution.⁴ The reason of this is obvious: if a limitation would be bad, as too remote, it cannot be made good by delegating the power to make it to some one else. If what is given to the donee of a power is an authority to act for the settlor or testator, then the appointment by the donee must be considered as an appointment by the settlor or testator himself.⁵ Now to this there is an apparent exception, which comes about in this wise: Sometimes what is in form an authority from a testator or settlor to make a limitation is in substance, not an authority to make a limitation, but a limitation to the donee himself, a gift to him in fee. Such is the case when a general power is given to A. to appoint by deed. A. can there appoint to himself. When this is the case, A., the nominal donee, instead of going

tempting to impose other restrictions upon future limitations than the Rule against Perpetuities. The absurdity of the result in *In re Park's Settlement*, and the difficulty of distinguishing that case from *Whitby v. Mitchell*, show the error of the first step which was taken in *Whitby v. Mitchell*. See § 298 *hh*, *ante*.

¹ I put the case in this form to avoid running against any peculiarities, real or supposed, of contingent remainders in realty.

² §§ 526-526 *c*, *ante*.

³ 26 Harv. Law Rev. 64.

⁴ I have pointed out, §§ 523-523 *b*, *ante*, that this does not require us to give the words used in executing a power a meaning different from that with which they are used by the donee of the power.

⁵ "One to whom a power of appointment is given by will stands to the testator substantially in the position of an agent toward his principal. An agent cannot do that which the principal cannot do." *Per* Baldwin, C. J., in *Bartlett v. Sears*, 81 Conn. 34, 44.

through the form of appointing to himself, may, so far as any question of remoteness is concerned, deal with the property as if he had gone through this form, and may treat it as he could any property of his own. That is, when A. makes what purports to be an appointment under such a power, what he really does is to make an appointment to himself, and then to grant his own property to the person named as appointee.¹

§ 951. Mr. Kales agrees with the general rule, and with the exception. The difference between us is this: Mr. Kales thinks the exception covers not only general powers, exercisable by deed, but also general testamentary powers. This I deny. Mr. Kales's argument is this: He takes up an expression, which I had used, that the exception applies when the donee is practically owner, and says that the question whether he is practically owner is to be determined at the time of the exercise of the power, and that when he exercises the power by will he is practically owner; and he illustrates thus: If a power is given to appoint by deed after the donee shall be married, he cannot appoint before he is married; his power to appoint is subject to the condition precedent of marriage, but after his marriage he can deal with the property as his own; so, Mr. Kales says, if a general testamentary power is given, it is a condition precedent that the donee shall die, but, when he has died, the condition precedent has been fulfilled, and he can deal by his will with the property as if it were his own.

§ 952. But a man cannot, in the eye of the law, be at the same time alive and dead. So long as he is alive, the condition necessary for

¹ An analogous situation is presented by *Routledge v. Dorril*, 2 Ves. Jr. 357. There a woman, having by her marriage settlement an exclusive power to appoint a fund among her issue, joined in the marriage settlement of a daughter, by which a part of the fund was put in trust for the daughter for life, with gift over to the daughter's children. The gift over was held good; that is, the daughter's marriage settlement was regarded as an appointment by the mother to the daughter and a settlement by the daughter as of her own prop-

erty, though there was no formal appointment by the mother to the daughter. But in the same case the mother made a will in which she appointed another part of the fund to the daughter's children. The former transaction was regarded as an appointment by the mother to the daughter, and a settlement by the daughter. The second could not be regarded as an appointment to the daughter, but was an appointment to her children directly and was bad. See §§ 528, 529, *ante*.

the exercise of the power is not fulfilled, and after he is dead he cannot be an appointee. And this is not only so as a metaphysical necessity. When a donee is given a general power by deed on his marriage, the creator of the power means to give the nominal donee on his marriage the absolute interest in the property; he does not mean to delegate his own right to make a limitation; but when he gives a testamentary power, he distinctly means that the donee shall have only a delegated authority; he does not mean at any time, or on the performance of any condition, to make a gift to the donee himself. When there is a power by deed given, the creator of the power means that at some time or on some condition the donee shall have in substance the fee. When a testamentary power is given, the creator as distinctly means that the donee shall never have the fee.

§ 953. There is no dispute that the exception does not extend to special powers. Now, as a practical matter, from the point of view of the Rule against Perpetuities, there is no difference between a testamentary general power and a special power.

§ 954. Suppose in the first place A. gives property to B. for life, with a power to appoint by will to B.'s issue (a special power), and B. appoints to his son C., who was born after A.'s death, for life, and on C.'s death to his issue living at his death. The gift to C.'s issue is unquestionably bad, as it is to vest on the death of a person born after A.'s death.

§ 955. Suppose, in the second place, that A. gives property to B. for life, with a power of appointment by will to whomsoever he pleases (a general power), and B. appoints to his son C., who was born after A.'s death, for life, and on C.'s death to his issue living at his death. The limitations of the property are precisely the same in both cases; in both it is tied up during the lives of B. and C., and on C.'s death given to his surviving children. Practically there is absolutely no difference. And yet if appointments under general testamentary powers are referred to the time of their exercise, the gift to C.'s children is bad in one case and good in the other.

§ 956. The donee of a power may be a person living at the date of the settlement or of the testator's death, or he may be a person then unborn.

§ 957. Let us take the latter first. *First. When the power is given to an unborn person.* The typical case is when, by a marriage settlement, property is given to the husband and wife for their joint

lives, and on their deaths to such one or more of the children as the parents or the survivor of them may appoint. Here, if the surviving parent appoints to such persons as any one of the children may by deed appoint, an appointment by the child is good, *Bray v. Bree*;¹ but if the power given by the surviving parent to its child is testamentary, an appointment by the child is bad for remoteness.² Mr. Kales recognizes that these cases state the law correctly; but he says they do not apply when the power is given to a living person. Let us take that up.

§ 958. *Second. When the power is given to a living person.* The distinction that Mr. Kales makes between this case and the former is: In that the power itself is too remote, while in this the power is good in its inception, and if there is remoteness it is only in the appointment. But here an expression which I may have used, following other authorities, has, I think, led Mr. Kales into error. Remoteness, in connection with the Rule against Perpetuities, is a quality to be attributed to an estate or interest; a power is neither, and remoteness is not properly to be predicated of it.

§ 959. It is true that no appointment under a power which may be exercised later than twenty-one years after a life in being is good, but it is not the whole truth, and it does not expressly state the reason why an estate appointed under such a power is too remote. The reason is this: No interest is good if its vesting is subject to a condition precedent which may be fulfilled beyond the required limits; the vesting of an interest appointed under a power is subject to the condition precedent of the power being exercised; if the power can be exercised beyond the required limits, the condition precedent may be fulfilled beyond the limits, and therefore the interest appointed under the power will be too remote.³

§ 960. But the exercise of a power may not be the only condition precedent to the vesting of an appointed estate, and therefore the exercise of a power may be confined to a life in being, and yet no good appointment can be made under it. For instance, a power may be given to a living person to make an appointment to take effect upon

¹ 2 Cl. & F. 453; § 477, *ante*.

² *Wollaston v. King*, L. R. 8 Eq. 165. *Morgan v. Gronow*, L. R. 16 Eq. 1, 9, 10; *Tredennick v.*

Tredennick, [1900] 1 I. R. 354. See §§ 526, 526 *a*, *ante*.

³ § 474 *a*, *ante*.

the indefinite failure of some one's issue. No good appointment can be made under this power.¹

§ 961. When a testamentary power is given to a living person, two conditions precedent must be fulfilled in order that an estate appointed under it shall vest. The first condition precedent is that the power be exercised by the donee; as the donee is alive when the power is created, this condition precedent must be fulfilled within or at the end of a life in being, and therefore its existence will not render an appointment under the power too remote. But there is another condition precedent, namely, that the appointed estate vest within twenty-one years after a life in being, and accordingly an appointed estate which may not vest within that time is too remote. Thus, if a general testamentary power is given to A., and A. appoints to B., an unborn person, for life, and after his death to B.'s surviving issue, the appointment to B. is good, because both the conditions precedent must be fulfilled within the required limits, but the appointment to B.'s surviving issue is too remote, because, though the first of the conditions precedent cannot be fulfilled later than a life in being, the second may be.

§ 962. Or, in other words, an appointment under a testamentary power is subject to the condition precedent that a life, the only life in question, has terminated; the estate appointed will therefore be too remote unless it must vest within twenty-one years after the death of the donee, and this is true whether the donee is alive or is an unborn person. If he is an unborn person, no appointment will be good, because of another condition precedent, namely, the exercise of the power within the period required; but the reason why a power exercisable by deed is good is the same whether the power be to an unborn or to a living person, and that is, because *such a power is not really a power at all, but is a direct limitation in fee.*²

¹ Bristow v. Boothby, 2 S. & St. 465; § 476 a, ante.

² If a general testamentary power could be considered as making the donee practically the absolute owner, that would be a reason why appointments under such a power by a donee living at the creation of the power should not be

referred to the date of the creation of the power, — and a reason which would not be applicable to appointments under such a power by a donee who was not living at the creation of the power. The practical ownership supposed to be conferred on the donee would not arise until the donee's death, which, in

§ 963. As to the authorities: That the remoteness of an estate appointed under a general testamentary power must be calculated from the time of the creation of the power in the case when the power is given to a living person as well as when it is given to an unborn person, the leading authority is *In re Powell's Trusts*,¹ in which the decision was made by James, V. C. This decision has been followed by the American courts. *Lawrence's Estate*.² *Boyd's Estate*.³ *Genet v. Hunt*.⁴ *Reed v. McIlwain*.⁵ *Thompson v. Pew*.⁶

§ 964. There are two English cases and one Irish which are *contra*, and hold that a general testamentary power to a living person should, like a general power by deed, be calculated, on the question of remoteness, from the time of the exercise of the power, and not from the time of its creation. These cases are *Rous v. Jackson*,⁷ *In re Flower*,⁸ and *Stuart v. Babington*.⁹ The last two cases simply follow and rest upon *Rous v. Jackson*, and that case is the only one which needs to be considered.

§ 965. Mr. Justice Chitty, who was the judge in that case, recognizes that he is differing from *In re Powell's Trusts*, and that "the question therefore arises whether the decision [in that case] is consistent with the course of authorities." He comes to the conclusion that "the Vice Chancellor in that case fell into an error," and that "there must be some error, some slip, in the decision of James, V. C., in *In re Powell's Trusts*."

§ 966. The statement of the authorities which Chitty, J., deems inconsistent with the decision in *In re Powell's Trusts* he gives in the following passage: "Mr. Butler and Lord St. Leonards both treat a

the case of an unborn donee, would be too remote an event. It is submitted, however, that it is not possible to treat a general testamentary power as making the donee practically the absolute owner. §§ 526b, 952, *ante*; 969, note, *post*. The idea of a practically absolute ownership which does not arise until the owner's death involves a contradiction in terms.

¹ 39 L. J. Ch. 188 (1869); § 526, *ante*.

² 136 Pa. 354 (1890).

³ 199 Pa. 487.

⁴ 113 N. Y. 158 (1889). The case of *Frear v. Pugsley*, 9 Misc. N. Y. 316, *contra*, is only a decision of a single judge at Special Term, made without discussion, and in view of *Genet v. Hunt*, need not be considered.

⁵ 113 Md. 140 (1910).

⁶ 214 Mass. 520, 523. A mere *dictum*, but a distinct one.

⁷ L. R. 29 Ch. D. 521 (1885).

⁸ 55 L. J. Ch. 200 (1885).

⁹ L. R. 27 Ir. 551 (1891).

general power of appointment as outside the rule against perpetuities. Lord St. Leonards in his work on Powers [Sugden on Powers (8th ed.)], p. 394, says: 'A general power is, in regard to the estates which may be created by force of it, tantamount to a limitation in fee, not merely because it enables the donee to limit a fee, which a particular power may also do, but because it enables him to give the fee to whom he pleases.' He draws no distinction between a power exercisable by deed or will or by will only, and it appears to me to make no difference by what instrument the power is made exercisable. Lord St. Leonards also says, p. 395, 'Therefore, whatever estates may be created by a man seised in fee may equally be created under a general power of appointment; and the period for the commencement of the limitations in point of perpetuity, is the time of the execution of the power, and not of the creation of it.' He goes on to quote Mr. Powell's note to Fearne's Executory Devises, p. 5, in favour of the contrary opinion, and in the result states that there appears to be no solid principle upon which the distinction taken by Mr. Powell can be supported, because the question whether the limitations are good does not depend on the fact that the donee of the power has also the fee in default of appointment, and that you can create the same estates and limitations under a general power of appointment as you can where you have the fee. There are remarks of other text-writers to the same effect, and I refer particularly to those of Mr. Butler, who says that this proposition is established 'after a series of cases.' Butler's Coke upon Littleton, 272 a."

§ 967. But the learned judge does not give all that is said by the authors whom he cites, and what he omits shows beyond doubt that they were referring to powers exercisable by deed, for the language in the omitted places is utterly inapplicable to general testamentary powers. Thus, at the end of the first extract from his book on Powers, Lord St. Leonards, after the word "pleases," adds: "he has an absolute disposing power over the estate, *and may bring it into the market whenever his necessities or wishes may lead him to do so.*" So when considering Powell's note, Lord St. Leonards says¹: "To take a distinction between a general power and a limitation in fee, is to grasp at a shadow whilst the substance escapes. By the creation of the power no perpetuity, not even a tendency to a perpetuity, is

¹ Powers, 396.

created. *The donee may sell the estate the next moment.*" So Butler, in his note to Co. Lit. 271 b, says: "A general power of appointment has no tendency to a perpetuity, as from its very nature, it enables the party to vest the whole fee in himself, or in any other person, and to liberate the estate entirely, from every species of limitation, inconsistent with that fee."

§ 968. It should be observed that whereas in America testamentary powers are more common than powers exercisable by deed, in England powers exercisable by deed, or by deed and will, are the more usual; and when English judges and writers speak of a general power they ordinarily mean powers which can be exercised by deed as well as by will.

§ 969. It is therefore submitted that the American courts have done well, both on principle and on authority, in following *In re Powell's Trusts* rather than the later case of *Rous v. Jackson*.¹

¹ The advantage from using a power instead of making a direct gift is, not that you can do through a power what you cannot do directly, but that a limitation which would be valid, but which it could not be originally seen would affect a desired end, may be later seen to do so. See an instance, § 523 *e*, *ante*.

Mr. Kales appended a note to this article, 26 Harv. Law Rev. 727. It seems to be merely a re-statement of the position taken in his former article. In an article in 27 Harv. Law Rev. 709, J. L. Thorndike, Esquire, supports Mr. Kales's view. It is submitted that neither Mr. Kales nor Mr. Thorndike have met the arguments offered in §§ 526*b*, 952, *ante*. The distinction between a general testamentary power and a general power exercisable by deed, that the donee in the former case cannot appoint to himself, is not incidental but essential, and involves a real practical

difference. The donee of a testamentary power cannot sell the property.

When the appointment is made by deed, the life estate has not expired at the time of appointment. The fact that the life estate has not expired has a practical bearing on the question of the date from which the Rule against Perpetuities should run. In framing successive limitations, the Rule allows the settlor a life or lives, and twenty-one years more, within which interests may be made to commence. If a life estate is given to A., a living person, with a power of testamentary appointment, the life allowed by the Rule is used up at his death, and any estates arising under the appointment ought to vest within twenty-one years (unless they are limited by some other lives in existence at the time of the settlement). There is no interval of time between the expiration of the life estate and the commencement

M.

VESTED REMAINDERS AND THE RULE AGAINST PERPETUITIES.

§ 970. A VESTED remainder is defined as a future estate which takes effect as a present estate immediately upon the expiration of the preceding estate or estates as originally limited,¹ and is ready at every moment during its continuance to come into possession whenever and however the preceding estates determine.² That is to say, a vested remainder is a future estate that is subject to no condition precedent except the termination of the preceding estate. An ideal system of law would perhaps not attach so much importance as does the common law to the distinction between the interest thus defined and all other future interests.³ Sometimes it is uncertain whether the preceding estate will ever terminate, as in the case of a remainder after an estate tail. On the other hand, not every estate which is subject only to a condition precedent which is certain to be performed is a vested estate.⁴ The common law, however, does distinguish estates subject

of the appointed estates when any person has a power of present disposition. A power of testamentary appointment is not a power of present disposition; for a testamentary appointment does not take effect until the appointor is dead. A man who never at any time has the power of present disposition never practically has the fee. But if A is given a power of appointment by deed, at any time during his life, then the life allowed by the Rule is not used up. There is really no life estate limited, but a fee is given to the donee; and the owner of this fee is at liberty to make a new settlement.

¹ § 8, *ante*.

² §§ 9, 101, 794, *ante*. This definition includes reversions, which, for the purposes of these remarks, may be classed with vested re-

mainders. § 11, *ante*. For other meanings of the term vested, see § 118, *ante*.

³ When a fee is given, subject to an estate for years, the so-called vested remainder after the estate for years is really, in the common-law view, a present estate, differing entirely from a vested remainder after a freehold. §§ 8, 59, *ante*. Though this difference, also, would be less important in an ideal system than it is in the common law. For the purpose of the Rule against Perpetuities, an estate subject to a term for years is to be classed with vested remainders. With respect to possession, it is a vested future estate; with respect to seisin, or freehold ownership, it is an estate not merely vested but present.

⁴ §§ 201, 797, *ante*.

only to the determination of the preceding estate from all other future interests, and various important consequences depend upon this distinction.

§ 971. The idea of a vested remainder is peculiar to the English law of real estate. It is unknown to the law of other countries.¹ It had its origin in the theory of seisin;² and is not strictly applicable to personal property.³ It is, however, practically adopted with regard to chattels both real and personal, at the present day; although the English text-writers refuse to recognize it in theory. For the purpose of the Rule against Perpetuities, at least, a limitation which would be a vested remainder in the case of realty is treated as a vested remainder.⁴

§ 972. It is well settled that the Rule against Perpetuities does not apply to vested remainders.⁵ This fact, in connection with the somewhat arbitrary nature of the discrimination of a vested remainder from all other future interests, introduces an artificial element into the Rule against Perpetuities, — a Rule which is in general very rational.⁶ Vested remainders have always been alienable; and this fact undoubtedly had an influence upon the historical development of the Rule in its existing form. But the alienability of these interests is not a sufficient ground for excluding them from the operation of the

¹ § 100, note 3, *ante*. Usufructs are familiar in the Civil Law, but they are regarded as servitudes, *jura in alieno solo*. § 761, *ante*.

² §§ 8, 100, *ante*.

³ §§ 81, 822, *ante*. There could, of course, be no seisin of chattels real, but there could be estates in them, not in possession, and such estates could be vested. § 806, *ante*. Whether a term for years, to begin after the termination of a preceding term, but not carrying any reversion, is a vested interest, is a question not free from doubt; *semble*, it is vested. § 320, note 5, *ante*. The true theory with regard to chattels personal seems to be that the so-called remainderman has the absolute ownership, and the tenant for life or for years has only a right of possession and use.

§§ 84, 117 *a*; App. F, §§ 825–829, *ante*.

⁴ §§ 117 *a*, 117 *b*, and App. F, §§ 789 *et seq.*, *ante*.

⁵ §§ 99, 205, 209, *ante*.

⁶ There is one peculiar sort of remainder which is called vested, and yet is not excluded from the operation of the Rule. This is the so-called vested remainder to a class, the number of whose members is not yet determined. §§ 110–110 *a*, 205 *a*, *ante*. This instance shows how little relation there was between the common-law notion of a vested remainder and the requirements of the Rule against Perpetuities (cf. § 100, *ante*); and that in the application of the Rule the courts have not blindly followed the common-law phraseology.

Rule.¹ It seems that in the ideal system of law above supposed no interests which did not vest in possession within the allotted period would be allowed. They are within the practical reason of a Rule against Remoteness.

§ 973. In most instances, to be sure, the allowance of vested remainders, which do not take effect in possession until a remote period, does not do much practical harm. A vested remainder after an estate tail is destructible. A remainder after life estates must vest in possession not later than the end of lives which begin within the limits of the Rule against Perpetuities.² But remainders after estates for years may take effect at very remote periods.³ And so may possibilities of reverter after determinable fees, where they are allowed,⁴ and resulting trusts after charitable trusts.⁵

§ 974. It is true that if life estates to unborn persons, or estates for terms exceeding twenty-one years, are allowed, then reversions after such estates must almost necessarily be recognized as existing. And perhaps a remainder vesting at the remote termination of a preceding estate is no more objectionable than a reversion to the grantor and his heirs.⁶ But the principle that if an estate begins within the allotted period, the remoteness of its termination does not affect its validity,⁷ seems to be the result rather than the cause of the exclusion of vested interests from the operation of the Rule against Perpetuities. In an ideal system it would seem to be necessary to forbid the creation of such particular estates; not, indeed, because the interests given to the grantees of such estates were themselves too remote, but because the remainders or reversions expectant upon them would vest in possession at too remote a period. The body of legal doctrines designed to prevent remote limitations under such a system would no doubt differ radically from the actual Rule against Perpetuities, but it would be more complete and consistent.

¹ §§ 268, 269, *ante*.

² But the fact that such remainders may vest in possession at a period beyond the limits of the Rule may have the inconvenient effect of rendering wholly void powers of appointment which were intended to subsist during the con-

tinuance of the life estates. §§ 500, 509 b, 509 i, *ante*.

³ § 210, *ante*.

⁴ § 312, *ante*.

⁵ § 603 i, *ante*.

⁶ Cf. § 312, *ante*.

⁷ § 232, *ante*.

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